Petition

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ALEXANDER L. STEVA
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81-1275

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

FOUNDING CHURCH OF SCIENTOLOGY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether the allowing of extensive documentary searches and seizures for "any and all fruits, instrumentalities and evidence (at this time unknown) of the crimes of conspiracy, obstruction of justice and theft of government property in violation of 18 U.S.C. §§ 371, 1503 and 641 which facts recited in [an] accompanying [35 page] affidavit make out" is an improper extension of *Andresen v. Maryland*, 427 U.S. 463 (1976).

2. Whether the "severance doctrine," by which the return of improperly seized items is allowed to cure an overly broad search and seizure of documents, is an appropriate remedy and consistent with the exclusionary rule.

3. Whether allowing the use of the "plain view doctrine" to justify seizures made in connection with a search for documents conducted pursuant to an "any and all fruits" clause of a search warrant, *Andresen v. Maryland*, results in a general search and seizure in violation of the Fourth Amendment.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, the Founding Church of Scientology, respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit.

JURISDICTION

The opinion of the Court of Appeals, the opinion for the Court filed by Circuit Judge MacKinnon, and the separate opinion for the Court filed by Judge Wald, in

which Chief Judge Robinson concurs, is as yet unreported, and appears as Appendix A. The opinion is dated October 2, 1981. The orders of the Court of Appeals denying a Petition for Rehearing and Suggestion for Rehearing En Banc, dated November 10, 1981, appear as Appendix B.

The opinion of the District Court is Appendix C.[1] The instant case has been the subject of an earlier Petition for Writ of Certiorari, No. 77-1090, which was denied on March 20, 1978. 435 U.S. 925. The earlier Petition sought reversal of an opinion of the Court of Appeals dated December 1, 1977, 572 F.2d 321, as modified by Orders dated December 8, 1977 and January 9, 1978. The Court of Appeals decisions of December and January, 1977-1978, reversed the opinion of the District Court, which is reported at 436 F. Supp. 689 (July 27, 1977), and which held the warrant here facially invalid.

Judgment of the Court of Appeals was entered on October 2, 1981. Petitioner timely filed a Petition for Rehearing, which was denied on November 10, 1981.

The jurisdiction of this Court is invoked pursuant to 18 U.S.C. § 1254(1).

The pertinent provisions of the First and Fourth Amendments of the Constitution and Rule 41(e) of the Federal Rules of Criminal Procedure are as follows:

First Amendment of the United States Constitution:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise

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[1] Both in the Court of Appeals and in the District Court, these proceedings are entitled "In Re Search Warrant Dated July 4, 1977, for premises at 2125 S Street, N.W., Washington, D.C."

thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourth Amendment of the United States Constitution:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Rule 41(e), Federal Rules of Criminal Procedure:

(e) **Motion for Return of Property.** A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

STATEMENT OF THE CASE

On July 8, 1977, fifteen agents of the Federal Bureau of Investigation, with ten other agents standing by, conducted a search for and seizure of documents at the Washington, D.C. premises of the Founding Church of Scientology. The search and seizure was conducted under color of a warrant which authorized the seizure of some 148 items specifically identified, thirteen other categories of items and, finally, additional "unknown" fruits, instrumentalities and evidence of certain conspiracies and other crimes alleged in the supporting affidavit.[2]

Whereas the supporting affidavit specifically and repeatedly recited that the sought-for documents were to be found (if at all) in the offices of the Information Bureau, an office of the Church, the warrant itself purported to authorize, in addition, the search of offices in addition to that Bureau and, pursuant to this broad authorization, the agents searched, as well, the Public Relations Bureau and Legal Bureau. They also searched the Finance Bureau, notwithstanding that the office was mentioned neither in the warrant nor in the affidavit.

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[2]Simultaneously, in Hollywood, California, two offices of the Church of Scientology were raided under authority of virtually identical warrants and the same supporting affidavit. The materials seized in California were later used, in part, in connection with convictions obtained in the criminal prosecutions, *United States of America v. Mary Sue Hubbard, et al.*, Cr. No. 78-0401 (D.D.C.). Documents obtained as a result of the Washington, D.C. search were not utilized in the criminal prosecution. Two of the defendants in *United States v. Hubbard*, Mary Sue Hubbard and Duke Snider, are filing a joint Petition for Writ of Certiorari which, in part, raises issues substantially similar to those raised in this Petition. The petitioners in both cases appeal from judgments entered against them by overlapping panels of the U.S. Court of Appeals for the District of Columbia on October 2, 1981.

According to the affidavit, the documents sought to be seized were maintained in approximately ten filing cabinets, plus an additional three file drawers, maintained in the Office of the Assistant Guardian for Information, which the affidavit represented was on the fourth floor.

Because the information upon which the search warrant was premised was over a year old, the agents found that the offices were not where they were supposed to be, their having been moved some time before. As a result, the agents entered into what the District Court found to be a broad, exploratory type of search, during which they spent nine and one-half hours sifting through six offices in search of files which were not, in the end, where the affiant said the informant said his informant had said three months earlier they would be. The government seized hundreds of documents which, grouped as the government has done, amount to some 567 items. Not a single document came from the office of the Assistant Guardian for Information, the alleged repository of the documents according to the affidavit. That office, on the third floor, was never entered.

Materials seized included scores of legal pleadings, including drafts by Church attorneys and filed pleadings, drafts of complaints for damages, attorney/client correspondence, copies of public laws, orders and statutes, pages from Who's Who, law review articles, listings from the Washington, D.C. phone directory, a report on the House Unamerican Activities Committee, magazine and newspaper articles on a vast spectrum of topics entirely unrelated to any allegations in the affidavit, such as the Unification Church, a probe into cults in Pennsylvania and a drug rehabilitation program. The F.B.I. seized hundreds of documents pertaining to biographical information about various individuals, none of whom were

named in the affidavit. They seized a Freedom of Information Act request form containing a schedule of fees for obtaining records; a folder labeled "Canada—Ontario Department of Mental Health" containing internal Church correspondence about a Canadian health organization; a folder labeled "American Jewish League Against Communism—George E. Sokolsky Award," which dealt with a Church inquiry regarding the granting of this award to Henry Taylor; correspondence between Steven Bird, the English solicitor for the Church and Scotland Yard; documents describing Church efforts against "anti-cult" legislation around the country and to encourage protecting the civil rights of members of minority religious groups; employment applications; a certificate from the District of Columbia Superior Court authorizing a minister of the Church to perform marriages; and numerous other totally irrelevant materials.

As Assistant United States Attorney Brian Shaughnessy told the District Court on July 27, 1977, such documents were on "closer examination" found "not to be relevant to the anticipated criminal proceedings," and thus were to be returned. On August 12, 1977, Assistant United States Attorney Gary Stark advised the Court that "approximately 40-50% of the items seized would fall into a category which, in the opinion of the prosecutors, would not be used in any criminal investigation." Although the government subsequently indicated by "R" notations on the warrant return which documents were to be given back to the Church, none have been returned.

In response to the search, the petitioner, in July of 1977, filed a motion pursuant to Rule 41(e) of the Rules of Criminal Procedure, for return of property. The District Court originally held that the search warrant on its face constituted a "general warrant" violative of

the Fourth Amendment by virtue of Item 162, which directed the seizure of:

> Any and all fruits, instrumentalities, and evidence (at this time unknown) of the crimes of conspiracy, obstruction of justice and theft of government property in violation of 18 U.S.C. §§ 371, 1503 and 641 which facts recited in the accompanying affidavit make out.

See *In Re Search Warrant Dated July 4, 1977,* 436 F. Supp. 689 (D.D.C. 1977).

The government appealed to the United States Court of Appeals which reversed, *In Re Search Warrant,* 572 F.2d 321 (D.C. Circuit 1977), ruling in part that incorporation of the affidavit into the search warrant rendered the warrant particular enough so as not to be a general warrant.[3] The Court of Appeals remanded the case to the District Court for consideration of other grounds alleged for invalidating the warrant, search and seizure that had not been considered by the District Court at the initial hearing. Among the grounds to be considered was the contention of petitioner that the manner in which the warrant was executed constituted a violation of the Fourth Amendment.

Upon remand, the District Court held a two day hearing at which it limited witnesses and made clear that it was confining itself to the issue of whether the search and seizure was a general exploratory one based upon the overbreadth of documents seized. The District Court, based upon an examination of the documents seized

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[3]The petitioner sought a Writ of Certiorari to review this holding of the Court of Appeals, *Founding Church of Scientology v. United States of America,* No. 77-1090. The petition was denied on March 20, 1978. 435 U.S. 925.

and the nature of the documents subsequently termed "innocuous documents" by the government, concluded that the seizure was not reasonable. Concluding that there was a flagrant violation of the Fourth Amendment and of 18 U.S.C. § 2234, which is designed to bolster the effectiveness of the particularization requirement of the Fourth Amendment, the Court directed the return of all documents seized on July 8, 1977 except for any alleged stolen items. The Court also declared that these materials were to be suppressed as evidence and not admissible at any hearing or trial, in accordance with the strictures of Rule 41(e).[4]

On October 2, 1981, the Court of Appeals issued a complex ruling. The concurring opinion of Judge Wald, in which Chief Judge Robinson joined, constitutes the majority ruling of the panel. See Appendix at 56a. It held that "the high percentage of documents [79%, see Note 4] voluntarily offered for return is therefore not an appropriate basis upon which to find a search unconstitutionally general." Op. of Judge Wald at 3, Appendix at 58a. Judge Wald's majority opinion then directs the District Court to determine which documents were seized pursuant to the list of particulars contained in the warrant and, if not, which were "lawfully seized under the plain view exception to the warrant requirement." Expressing disagreement with Judge McKinnon's discussion of the plain view doctrine as "insufficiently sensitive to the limitations which govern the seizure of documents

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[4]The Court also ruled against petitioner on "all other grounds" by denying petitioner an opportunity to litigate those grounds. Accordingly, the petitioner appealed to the Court of Appeals for the District of Columbia as to those arguments which were not considered and denied.

nowhere mentioned in the warrant," the majority then sets out standards by which the plain view doctrine can be invoked in this case (see Slip Op. at 7).[5] Thereafter, Judge Wald's majority opinion affirms the District Court's dismissal of petitioner's remaining challenges and remands the case back to the District Court for a particularized documentary review.

The petitioner duly filed a Petition for Rehearing and Suggestion for Rehearing En Banc, which was denied by the Court of Appeals on November 10, 1981.

REASONS FOR GRANTING THE WRIT

ISSUE 1: IMPROPER EXTENSION OF *ANDRESEN*–GENERAL WARRANT

This case presents issues of exceptional importance generated by the extension of this Court's holding in *Andresen v. Maryland*, 427 U.S. 463 (1976). Further, there is conflict among the courts which have dealt with this subject since *Andresen*.

In the initial phase of this litigation, the petitioner pressed in the District Court as a threshold claim the fact that the warrant was rendered a general one on its face by the "any and all fruits clause." The District Court agreed, but the Court of Appeals reversed this decision, holding that the warrant was not general because the reference to the "facts recited in the accompanying affidavit," facts the Court assumed the agents to know, imparted sufficient particularity to meet constitutional

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[5]A similar discussion in greater depth appears in *United States v. Mary Sue Hubbard, et al.* (D.C. 11/10/81), where the same issue is raised in the context of the criminal litigation.

standards. During the second phase in the District Court hearings, limited as they were, it became apparent on the record that the agents were not using the 35 page affidavit as a guide to particularized seizures but, in fact, were seizing anything at all that looked suspicious, whether or not it related to the facts in the affidavit.[6] In short, the record as it was developed in the second round of these proceedings, amply demonstrates why unquestionably this warrant was a general one.[7]

In *Andresen v. Maryland, supra,* this Court found constitutionally permissible a documentary search in which the warrant, after an exhaustive list of particularly described documents, added the phrase "together with

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[6]This is also exemplified dramatically by the facts surrounding the search and seizures under the identical warrants conducted by the F.B.I. in two facilities of the Church of Scientology of California. Those actions are the subject of a Petition for Certiorari filed by defendants Hubbard and Snider in the case of *United States v. Hubbard, et al.*

[7]Upon the original order of the District of Columbia Court of Appeals on December 1, 1977, the petitioner moved for rehearing and suggested rehearing en banc. Judges Wright, Bazelon and Leventhal voted against a rehearing en banc, noting in a separate opinion filed by Judge Wright that the case rested squarely on *Andresen,* and that "in the interest of reducing unnecessary delay in this litigation, I think the case should now be passed on to the Supreme Court." *In Re Search Warrant* dated July 4, 1977, Order dated January 4, 1978. In another separate statement of Judge Robinson, with whom Judge McGowan concurred, Judge Robinson stated that he felt the issue was not one of "en banc caliber" essentially for the reason that "the panel opinion rests squarely upon its quasi-factual interpretation of the total context of this warrant . . . ." Order filed January 4, 1978. We would submit that the factual context that Judges Robinson and McGowan felt was lacking at the end of the first round for the purpose of rendering the case one of en banc caliber is now present following the hearings on the second round in the District Court.

other fruits, instrumentalities and evidence of crime at this [time] unknown." This Court, in footnote 11, also observed in passing that numerous papers were received and not introduced into evidence and that, "to the extent such papers were not within the scope of the warrants or otherwise improperly seized, the state was correct in returning them voluntarily and the trial judge was correct in suppressing others." While the Court, in that same footnote, did note the grave dangers inherent in executing a search warrant for a person's papers, the Court did find the search of Andresen's office to be within acceptable constitutional limits because:

(1) The "other fruits" clause was specifically referenced to lot 13T, a subject of the criminal investigation;

(2) The investigation was conducted by highly trained investigators; and

(3) These investigators, because of their training, could properly decide whether other papers could be used to show the unlawful intent with respect to the lot 13T transaction.

The Court of Appeals has taken the holdings of *Andresen* and extended them in an extraordinary manner: first, we have not in the present case a warrant of particularized documents but, rather, a warrant giving wholesale categories of documents which the Court of Appeals said could only be understood by incorporation with a rambling 35 page affidavit; second, the "other fruits" clause relates not to one specific criminal action as it did in *Andresen,* but to the crimes of "conspiracy," and all that a conspiracy can be, "obstruction of justice" and "theft of government property," which "facts recited in the accompanying affidavit make out." A comparison of the "incorporated" 35 page affidavit in the present

situation points out how radical this extension is; third, the highly trained investigators in *Andresen* have been replaced here by F.B.I. agents who were casually briefed, most of whom did not utilize the "incorporated" affidavit during the search, if, indeed, they had access to it at all, and as we have recited above, who seized all sorts of material that the District Court found outside of the warrant:

> A survey of the inventory of items seized by the F.B.I. agents reveals that these selection procedures led to the seizure of several hundred documents—nearly half or more of the seizure—which were not designated by the warrant; and by not stretch of the imagination could they be regarded as within the designated categories of documents to be seized. In effect, the agents conducted a general seizure.

Slip Op. at 5, Appendix at 72a.

Three judges of the Court of Appeals suggested on January 4, 1977 that this case, then in its earlier stage without factual testimony, was appropriate for this Court to review in light of the *Andresen* decision. Two other judges of the Court of Appeals suggested that a clearer record would be necessary to make the case worthy of *en banc* review. We would respectfully submit that there is now a record which would satisfy the objections of the latter two Court of Appeals judges and that the implicit fears of the other three judges of the confusion created by *Andresen* has been borne out by several post-*Andresen* cases. These reveal an overall confusing attempt of the courts to step gingerly through the constitutional minefield that has been created by what the government perceives as a broad authorization for "any and all fruits" type warrants. For example, in *United States v. Jacob*, 502 F. Supp. 1221 (D.C. Md. 1980), the government argued that the 1977 *In Re Search Warrant*

decision of the Court of Appeals stood for the proposition "that it is unnecessary to specify in the warrant the crimes for which evidence is sought." 502 F. Supp. at 1225. The District Court in *Jacob* felt that this was too broad a reading of *In Re Search Warrant* and *Andresen* and rejected as too broad a warrant which authorized the seizure of evidence of "violations of federal criminal law including but not limited to mail fraud in violation of 18 U.S.C. § 3141." On the other hand, the United States District Court in *United States v. Giresi*, 448 F. Supp. 445 (D.C.N.J. 1980), cited *Andresen* and the 1977 *In Re Search Warrant* decision in support of that part of a warrant which directed the seizure of "personal telephone books, records of financial transactions, personal notebooks and other documents and items which are contraband, fruits, instrumentalities, evidence of a conspiracy (18 U.S.C. § 371) to violate [enumerated and defined federal] firearms statutes . . . and a conspiracy to violate 18 U.S.C. § 1962 relating to a racketeering enterprise." 488 F. Supp. at 456. The Supreme Court of Nebraska in *State v. Tara Enterprises, Inc.*, 202 Neb. 260, 274 N.W.2d 875 (1979), gave approval to a search warrant which, after identification of nine films, directed the seizure of "any other item or items which constitutes evidence of the knowing, willful [sic] and unlawful exhibition and dissemination of said films . . . ." The Nebraska court relied on the 1977 *In Re Search Warrant* opinion to find specificity. Compare this, however, with *Application of Lafayette Academy*, 610 F.2d 1 (1st Cir. 1979), which held that an "any and all fruits" type clause was too broad and sought to distinguish *In Re Search Warrant.*

A review of these cases demonstrates that the government is unquestionably relying on *Andresen* to authorize

the widespread usage of "any and all fruits" clauses in search warrants. This factor, combined with a distinct lack of clarity in the court decisions as to the proper guidelines for the use of such a clause in view of *Andresen,* renders this question ripe for review by this Court.

ISSUE 2: "SEVERANCE DOCTRINE"

The issue of whether the severance doctrine may be used to cure overbroad searches and seizures presents an important and unsettled question of law upon which there are also conflicting decisions.

The Court of Appeals has misread *Andresen* so as to provide that the government's promise to return the "innocuous documents" will cure the overbroad seizure. What the Court has sanctioned is precisely what Chief Judge Bryant feared in his opinion:

> However, I do not believe that the Court in *Andresen* intended to condone as a practice (a) the wholesale seizure and carting away of documents by officers who willfully exceed the scope of their authority under a warrant, and thus violate the law; (b) a more leisurely screening and selection of those which are relevant by prosecutors in their offices; and (c) the voluntary return of unwanted items. If this were so, then the manifested concern that private papers be awarded the fullest possible Fourth Amendment protection is meaningless. [Footnote omitted.]

Appendix at 74a.

As Chief Judge Bryant feared, this decision tremendously expands the observation of this Court in *Andresen* at footnote 11, 427 U.S. 463, that "in searches for papers, it is certain that some innocuous documents will be

examined, at least cursorily, in order to determine whether they are, in fact, among those papers authorized to be *seized.*" What the Court of Appeals decision in this case produces is a rewriting of the sentence so that it now reads, "in searches for papers, it is certain that some innocuous documents will be *seized,* at least cursorily, in order to determine whether they are, in fact, among those papers authorized to be *seized.*" We suggest that this extension of *Andresen* turns the Fourth Amendment upon its head. We suggest that the "severance remedy" approved by the Court of Appeals in this case, that is, allowing the return of the "innocuous" documents to cure the overbreadth of the search, clearly abrogates the exclusionary rule and is contrary to the long-standing statement of that rule which has, as yet, remained the law of the land.

We would submit that review of other court decisions on the issue of severance reveals, as noted by the District Court in *United States v. Giresi, supra,* 488 F. Supp. 445, "a difficult issue of Fourth Amendment jurisprudence for which there at first glance exists a curious division of opinion between the federal and state courts . . . ." 488 F. Supp. at 459 (footnotes omitted). As Judge Coolahan observed in a scholarly review of the subject, state court decisions appear uniformly to permit severance where a warrant is not otherwise general in nature[8] but that

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[8]See 488 F. Supp. 459, n.17, citing:

[17]In alphabetical order by State: *State v. Johnson,* 160 Conn. 28, 34, 273 A.2d 702, 705 (1970); *United States v. Ketterman,* 276 A.2d 243, 247 (D.C. App. 1971); *Butler v. State,* 130 Ga. App. 469, 203 S.E.2d 558, 562 (1973); *People v. Russell,* 45 Ill. App. 3d 961, 4 Ill. Dec. 579, 360 N.E.2d 515, 517-18 (1977); *People v. Haas,* 55 App. Div. 2d

[footnote continued]

federal courts have recently expressed a disagreement with the severance doctrine, some of them applying it in an uneven way.[9] From these, Judge Coolahan infers a somewhat different—and we believe unclear—*federal* standard that the severance rule will not be invoked where "the warrant under consideration is *dangerously akin* to a general warrant." 488 F. Supp. at 460 (emphasis added). As with the first issue, we would submit that the various state and federal decisions on this question are uniformly unclear and that there is no observable or readily understandable guideline or standard by which the courts can apply the "severance doctrine," or if they can do it properly at all.

ISSUE 3: PLAIN VIEW DOCTRINE AND AN "ANY AND ALL FRUITS" CLAUSE

The case presents an important unsettled issue of law.

As a matter of sheer constitutional logic, we submit that the coupling of the plain view doctrine in connection with an "any and all fruits" clause of the type allowed in the *Andresen* case results in a *per se* general search and seizure. The Court of Appeals held that, in a

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683, 390 N.Y.S.2d 202 (2d Dep't 1976) (*accord, People v. Mangialino, supra*); *State v. Sagner*, 12 Or. App. 459, 506 P.2d 510, 516 (1973); *State v. Clark*, 281 N.W.2d 412, 416 (S.D. 1979); *State v. Halverson*, 21 Wash. App. 35, 584 P.2d 408, 409 (1978).

[9] 488 F. Supp. at 460, citing:

Application of Lafayette Academy, Inc., supra, 462 F. Supp. at 772; *United States v. Hatfield*, 461 F. Supp. 57, 58 (E.D. Tenn. 1978), *rev'd on other grounds*, 599 F.2d 759, 761-62 (6th Cir. 1979); and *United States v. Burch, supra*, 432 F. Supp. at 963-64.

documentary search, perusal of all documents within the realm of the warrant is permissible to determine which of these documents should be seized. Perusal is, we submit, itself a form of seizure (of knowledge) and certainly an invasion of privacy. Relying on this invitation to peruse documents for "any and all fruits," the agents are then allowed to seize any documents thus properly brought into their "plain view" by virtue of this wholesale perusal. The result is nothing short of a general exploratory search and seizure. The constitutional dilemma created by the combined use of these two doctrines is amply illustrated by the present case. The use of many agents, whose actions in seizing many "innocuous documents" indicates improper briefing, many of whom were without access to a complicated warrant that denotes not only seizures of particular documents but, as well, as "any other fruits," the vagueness imparted to all this by the fact that the warrant is directed to "conspiracy," and the vast examination of documents, all demonstrate how threatening to Fourth Amendment liberties the use of the "plain view doctrine" is in this sort of situation.

In inviting the District Court to apply the plain view doctrine, see Opinion of Judge Wald at page 6, Appendix at 61a, *et seq.*, the Court was without meaningful or current guidance. Relying on *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), the Court initially decided that:

> The plain view exception must be defined in such a way as to preclude using a document search warrant as authority to search for and seize all evidence of wrongdoing in the form of documents which happen to be located at the search site.

Opinion of Judge Wald at 7, Appendix at 62a (citation omitted).

The Court then explicated three limitations that it believes other courts have placed upon the plain view exception: first, the searching agents must lawfully be in the location where their plain viewing occurs; second, any seized item unspecified in the warrant must possess an incriminating character plainly and immediately apparent on its face, "a character sufficiently incriminating to establish probable cause for its seizure despite the absence of a warrant mentioning it"; and, third, "the searching agent must come upon the unspecified items inadvertently." Slip Opinion at 7, Appendix at 62a.

With regard to the condition of "inadvertence," the Court of Appeals admitted that "this requirement has been applied unevenly by courts."[10] Judge Wald concluded that, "I believe the inadvertence limitation stands for the simple proposition that agents must not be searching for items outside the particulars of the warrant when they conduct the search; in other words, agents *must act in good faith* to confine themselves to searching for specified items." Opinion of Judge Wald at 8, Appendix at 63a (emphasis added). The interjection of the "good faith" standard is itself controversial, its application to search and seizure law being disapproved by some courts,

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[10] *Compare, e.g., United States v. Davis*, 542 F.2d 743, 745 (8th Cir.), *cert. denied*, 429 U.S. 1004 (1976), and *United States v. Wysong*, 528 F.2d 345 (9th Cir. 1976) (courts characterizing as "inadvertent" the discovery of items as to which it appears police could have made showing of probable cause to seize, but failed to do so), *with United States v. Winston*, 373 F. Supp. 1005, 1007 (E.D. Mich. 1974) (seizure of item cannot be "inadvertent" if, before searching begins, police have probable cause to seize it). (Opinion of Judge Wald at 8, Appendix at 63a.)

including this Court, see *Scott v. United States,* 436 U.S. 128 (1978), and approved by others, see, *e.g., United States v. Williams,* 622 F.2d 830 (5th Cir. 1980), *Richmond v. Commonwealth,* 50 U.S.L.W. 2162 (Ky. 7/31/81).

Even if the use of the "plain view doctrine" in connection with "any and all fruits" searches and seizures does not render the search, *per se,* a general one, it is clear that when, if at all, and under what circumstances the plain view doctrine can be used in documentary searches, is one requiring guidance from this Court.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1981

Miscellaneous No. 77-0151

[Filed: October 2, 1981]

In Re: Search Warrant Dated
July 4, 1977, For Premises at
2125 S Street, Northwest,
Washington, D.C. — No. 79-2138

United States, *Appellant*

In Re: Search Warrant Dated
July 4, 1977, For Premises at
2125 S Street, Northwest,
Washington, D.C. — No. 79-2176

Founding Church of Scientology, *Appellant*

**APPEALS FROM THE
UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA**

Before: ROBINSON. Chief Judge, MACKINNON and WALD, Circuit Judges.

JUDGMENT

These causes came on to be heard on the records on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court, that the judgment of the District Court appealed from herein is hereby reversed and the case is remanded to the District Court for further proceedings consistent with the opinion of this Court filed herein this date.

Per Curiam

For the Court

/s/ George A. Fisher
Clerk

Date: October 2, 1981

Opinion for the Court filed by Circuit Judge MacKinnon.

Separate opinion for the Court filed by Circuit Judge Wald.

Chief Judge Robinson concurs in the opinion filed by Circuit Judge Wald.

OPINION

United States Court of Appeals for the
District of Columbia Circuit

October 2, 1981

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-2138

IN RE: SEARCH WARRANT DATED JULY 4, 1977,
FOR PREMISES AT 2125 S STREET, NORTHWEST,
WASHINGTON, D. C.

UNITED STATES, APPELLANT

No. 79-2176

IN RE: SEARCH WARRANT DATED July 4, 1977,
FOR PREMISES AT 2125 S STREET, NORTHWEST,
WASHINGTON, D. C.

FOUNDING CHURCH OF SCIENTOLOGY, APPELLANT

Appeals from the United States District Court
for the District of Columbia

(D.C. Miscellaneous Action No. 77-0151)

Argued December 9, 1980

Decided October 2, 1981

Michael W. Farrell, Assistant United States Attorney, with whom *Charles F. C. Ruff*, United States Attorney,

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

John A. Terry, Raymond Banoun, Judith Hetherton and *Steven C. Tabackman*, Assistant United States Attorneys, were on the brief for appellant in No. 79-2138 and cross-appellee in No. 79-2176.

Phillip J. Hirschkop with whom *Victor M. Glasberg* and *Leonard S. Rubenstein* were on the brief for appellee in No. 79-2138 and cross-appellant in No. 79-2176.

Albert P. Blaustein and *Jay A. Sigler* were on the brief for amici curiae, pro se, urging that the search warrant and search were constitutionally invalid.

Nadine Strassen was on the brief for amicus curiae American Civil Liberties Union, urging that the Court hold that the search warrant and search were unconstitutionally general.

Before: ROBINSON, *Chief Judge*, MACKINNON and WALD, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* MACKINNON.

Separate opinion for the Court filed by *Circuit Judge* WALD.

Chief Judge ROBINSON concurs in the opinion filed by *Circuit Judge* WALD.

PER CURIAM: Judge MacKinnon files an opinion in which Chief Judge Robinson and Judge Wald concur, except with respect to Part III, B (entitled "The Bases of the District Court's Decision"), Part X (entitled "The Remand to Consider the Return of Individual Documents"), and the Conclusion. Judge Wald files a separate opinion in which Chief Judge Robinson concurs. Judge Wald's opinion, and Judge MacKinnon's opinion, except for Part III, B, Part X, and the Conclusion, together constitute the opinion of the court. The district court's order is reversed and the case remanded for further proceedings consistent with the opinion of the court.

So Ordered.

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MACKINNON, *Circuit Judge:* In this appeal we again consider legal challenges by the Founding Church of Scientology (hereinafter, Scientology) to a July 8, 1977 search and seizure by agents of the Federal Bureau of Investigation (FBI) on the premises of the Scientology's Washington, D.C. headquarters. The search, conducted pursuant to a warrant, was for documentary evidence of a conspiracy by, *inter alia*, Scientology officials and agents to steal documents from government offices. Upon the motion of Scientology under Fed. R. Crim. P. 41(e) for return of property "unlawfully seized," [1] the district court, while rejecting Scientology's other challenges to the search and seizure, ruled that the agents had engaged in a *general seizure* violative of the Fourth Amendment and ordered the suppression and return of all 567 of the documents seized. Both sides appealed, and the court stayed its order pending the government's appeal. We now affirm in part and reverse in part, holding that the record does not support the conclusion that the agents executed a general seizure and that Scientology's other challenges to the search and seizure are also without merit. While we reiterate our prior holding that Scientology is entitled to the return of items seized outside the warrant, we note that Scientology has shown the illegal seizure of no item that the government has not already agreed to return.

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[1] Rule 41 provides in part:

> (e) *Motion for Return of Property.* A person aggrieved by an unlawful search and seizure may move the district court . . . for the return of the property on the ground that he is entitled to lawful possession of the property which was unlawfully seized. . . . If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial.

Several months after the motion for return was filed a number of Scientology officials were indicted, making the motion in effect a Fed. R. Crim. P. 12 motion to suppress. See note 2 *infra*.

I. PRIOR PROCEEDINGS

According to the affidavit filed in support of the July 4, 1977 search warrant that is the subject of this proceeding, the offenses that caused the warrant to be issued were committed in connection with Scientology's tax exemption as a religious institution under the Internal Revenue laws. In support of this objective Scientology set out to obtain government documents

> by [valid] FOIA [Freedom of Information Act] actions and covert scientology operations against various United States agencies; those documents gathered through legitimate, non-covert channels are marked "FOI" and those obtained by covert actions are marked "non-FOI". (The distinction is noted so that Church officials can be certain which documents can safely be disclosed for public purposes.) *Covertly obtained documents are those obtained either through outright burglaries or theft by Scientology agents who work for government agencies.*

Affidavit of FBI Special Agent Robert Tittle ("the Tittle Affidavit"), *reprinted in* Joint Appendix (JA) at 61 (emphasis added).

A further allegation in the supporting affidavit states:

> In December, 1975 Cindy Raymond, the Collections Officer within [Scientology's] Deputy Guardian for Information, U.S. Office, developed a "program" calling for covert operations designed to obtain Interpol documents regarding the Church of Scientology contained in files held by government agencies. That program was developed in response to the general directive contained in Guardian Order [GO] 1634 composed and disseminated by the Guardian Office World-Wide. *All documents not turned over to the Church by the government pursuant to an FOIA request were to be covertly obtained by agents of the Church, according to the*

> *Raymond program. That program was to be implemented in the District of Columbia either by burglarizing the targeted office or by placing a secure Scientology agent on the staff of the targeted government attorney.* This agent would have access to the attorney's files and would xerox the sought-after documents and turn them over to Meisner, who supervised the activities of all Scientology covert agents in Washington, D.C.

(*Id.*) (JA 47-48) (Footnote omitted) (Emphasis added).

The warrant directed the search of a fourth floor suite in Scientology's Washington, D.C. headquarters at 2125 S Street, N.W. The warrant contained 162 descriptions of property. Items 1-99 list documents stolen and copied from the office of an Assistant United States Attorney. Items 100-148 list documents stolen and copied from a Justice Department attorney. Items 149-161 list other stolen documents and internal documents of Scientology alleged to set forth Scientology's plan to purloin government documents. Item 162, finally, authorized the agents to seize:

> 162. Any evidence (at this time unknown) of the crimes of conspiracy, obstruction of justice and theft of government property in violation of 18 U.S. Code §§ 371, 1503 and 641 *which facts recited in the accompanying affidavit make out.*

(JA 39, emphasis added). The reference to the "accompanying affidavit" effectively incorporated a 33-page "Affidavit in Support of Search Warrant" (JA 42-74) that was attached to the warrant's "Description of Property" (JA 33-41). The affidavit was signed by FBI Agent Robert Tittle and was based on the disclosure of Michael Meisner, who claimed to have participated personally with other Church officials in a conspiracy to burglarize government offices.

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The district court originally held that the search warrant constituted a "general warrant" violative of the Fourth Amendment guarantee against unreasonable searches and seizures. Such ruling relied principally on a claim that Item 162 did not sufficiently particularize the offenses. *In Re Search Warrant Dated July 4, 1977*, 436 F. Supp. 689 (D.D.C. 1977). On appeal to this court we reversed, *In re Search Warrant*, 572 F.2d 321 (D.C. Cir. 1977), ruling that the district court "gave an overbroad construction of the search warrant, improperly interpreted the relevant offenses, ignored a significant part of item 162 [the reference to the "accompanying affidavit"], and gave an unduly restrictive construction to the Supreme Court decision in *Andresen v. Maryland*, [427 U.S. 463 (1976)]." We also held that the magistrate properly found probable cause to have been shown for the search. *Id.* at 323-24. Our judgment accordingly reversed the decision of the district court, vacated the 1977 order in its entirety and remanded the case to the district court for consideration of other grounds alleged for invalidating the warrant that had not been considered by the district court at the initial hearing. The other grounds were (1) that the manner of the search constituted a violation of the Fourth Amendment, (2) that the agents employed unnecessary force in violation of 18 U.S.C. § 3109; and (3) that the warrant was issued on stale allegations of fact. 572 F.2d at 328. We also noted at that time that

> If any of the documents seized in the search by the agents exceed the bounds of the search warrant they should be returned, but the "fruits, instrumentalities and evidence" that were seized, and that are relevant to the particularized offenses and which are specifically referred to in the affidavit and search warrant, should be delivered to the government forthwith for use in connection with the grand jury proceedings. Our order herein does not restrict the right of the court to consider and determine whether any specific

document may have been seized outside the authority of the search warrant as construed in this opinion.

572 F.2d at 327.

II. The Remand

In response to the district court's request for help in limiting its task on remand, the government indicated by marking on its documents inventory an "R" for each document that the government explained that it was willing to return. These "return items" were those it did not plan to use in any pending criminal proceeding.[2]

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[2] Simultaneously with the search of appellant's Washington offices on July 8, 1977, FBI agents executed two search warrants for the search of Scientology's offices in Hollywood, California. A motion for return of the property seized in that search was denied in two separate opinions by the United States District Court for the Central District of California. *Church of Scientology v. United States*, No. CV-77-2565-MML (C.D. Cal. April 4, 1978); *Church of Scientology v. United States*, No. CV-77-2565-MML (C.D. Cal. July 5, 1978). Appellant's appeal from that decision was dismissed as interlocutory and nonappealable. *Church of Scientology v. United States*, 591 F.2d 533 (9th Cir. 1979).

Meanwhile, on August 15, 1978, a grand jury in the District of Columbia indicted eleven officials or agents of Scientology on multiple charges including conspiracy to steal federal property and to obstruct justice. The defendants moved to suppress the evidence seized in the California search, the Government having agreed that in the case under indictment it would use only the California evidence, and no evidence from the Washington search, pending the outcome of the instant litigation. On September 13, 1979, the District Court denied the motions to suppress. *United States v. Hubbard, et al.*, Cr. No. 78-0401 (D.D.C.). On October 26, 1979, the defendants were found guilty on various counts after a stipulated trial, and were subsequently sentenced to terms of imprisonment and fines. Appeals from those convictions are now pending in this Court.

In addition, on August 15, 1977, appellant filed a civil suit in the District Court against the Department of Justice and

The court subsequently held a two day hearing, at which it heard the testimony of fourteen witnesses called by Scientology. Among these were four of the fifteen FBI agents who conducted the search and seizure. Allowing very little opportunity for cross-examination by the government, the court, with Scientology counsel, inquired of these agents the reasons for their seizure of particular documents. The court made plain, however, that it was interested only in those documents that the government had agreed to return.[3] And in fact all but one of the approximately thirty documents that were marked for identification and before the court during the hearing were return items.[4] Despite the government's insistence that the return items were properly seized,[5] the court ruled that the government had admit-

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other parties, including the participating FBI agents, seeking damages as a result of the Washington search and seizure. *Founding Church of Scientology v. Kelley*, Civil Action No. 78-0107 (D.D.C.). Proceedings in that case were stayed by order of the court on December 28, 1977, pending final decision in the instant litigation.

[3] See, e.g., JA at 360-61.

[4] See *infra* at p. 22.

[5] "MISS HETHERTON [AUSA] . . . Also, your Honor, I would like to say that we have never maintained or stated that these documents that we are returning, which I am the one who reviewed and decided which ones should be returned—that they are totally irrelevant and that they are not in fact corroborative of the affidavit. We filed a pleading with your Honor, Memorandum in Support of Evidentiary Objection, and in that Footnote 1, we stated that these documents that we're returning are *documents that we don't intend to use.* We don't need them in a criminal prosecution, but a review of them in fact will reveal, as the testimony of the agents has revealed, that they in fact were specific documents, on some occasions, within the first 161 items. That others of them are plainly corroborative of the affidavit [incorporated

ted that the return items were "innocuous," [6] and then chose to define "innocuous" as "meaning they have no criminal connotation." (JA 14).

Upon reviewing the testimony, several of the documents just mentioned, and the summary descriptions found in the government's inventory, the district court ruled that the agents of the United States illegally and unconstitutionally executed the warrant and converted their seizure of documents into a *general exploratory seizure* in violation of the Fourth Amendment and of

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> by reference in item 162]. And counsel [for the Church] continually represents to this Court that we have said that they're totally without any evidentiary value or something of that nature.
>
> That has not been our representation, and as long as counsel is going to insist that that is relevant to anything that this Court has to decide, we think that [the documents to be returned] should perhaps be maintained before this Court, at least in the Court's custody until the proceedings are over.

(JA 899-900) (Emphasis added).

[6] The support cited by the district court for its conclusion that the government considered the return items "innocuous" was as follows. An Assistant United States Attorney (AUSA) told the district court on July 27, 1977 that the return items were those that "on closer examination [were] found not to be relevant to the anticipated criminal proceedings." See JA 14 n.5. On August 12, 1977, another AUSA explained again that the return items were those "which in the opinion of the prosecutors would not be used in any criminal investigation." See *id.* at 15 n.4. The court then said, "That is what they call innocuous documents?" The AUSA replied:

> Innocuous or whatever adjectives are appropriate. I don't know. I see no reason why documents which fall into that category cannot be returned. [*Id.*]

18 U.S.C. § 2234.[7] With respect to the inventory, the court stated:

> "[a] survey of the inventory of items seized by the F.B.I. agents reveals that [the] selection procedures [they described in their testimony] led to the seizure of several hundred documents—nearly half or more of the seizure—which were not designated by the warrant; and by no stretch of the imagination could they be regarded as within the designated categories of documents to be seized."

(JA 14). The court elaborated:

> the quantity of *innocuous documents* seized . . . [was] not the determining factor in . . . concluding that the seizure is unreasonable. Rather, it is the stark fact that *they* [the innocuous documents] were seized in spite of the fact that they obviously were not included in any of the categories of items to be seized as contained in the warrant, and thus in flagrant violation of the statute (18 U.S.C. § 2234) which is designed to bolster the effectiveness of the particularization requirement of the Fourth Amendment.

(JA 19) (Emphasis added).

The court's order directed the return of *all* materials seized in the July 8, 1977 search (except stolen items) and declared that these materials were to be suppressed as evidence, and not admissible at any hearing or trial. (JA 19-20). The court ruled against Scientology on "all other grounds." (JA 19).

On its appeal, the government contends that the district court erred as a matter of fact in finding that the

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[7] 18 U.S.C. § 2234 provides:

> Whoever, in executing a search warrant, willfully exceeds his authority or exercises it with unnecessary severity, shall be fined not more than $1,000 or imprisoned not more than one year.

agents' seizure exceeded the scope of the search warrant, and in any event erred as a matter of law in concluding that the appropriate remedy would be return and suppression of every document seized. On its cross-appeal, in addition to defending the district court's finding of general seizure, Scientology argues that the search warrant was facially invalid, that it was unsupported by probable cause, that any allegations that did support the warrant were stale, that the agents' forcible entry into rooms and file cabinets violated 18 U.S.C. § 3109 and requires return of the documents, and that Scientology was entitled to an evidentiary hearing to impeach the Tittle Affidavit. We discuss these contentions in turn.

III. The Claim of General Exploratory Seizure

The finding that the agents "conducted a general seizure" (JA 14) appears to have rested on the subsidiary findings that (1) the agents by their testimony showed they were interpreting the search warrant in an impermissibly broad fashion, (2) many of the "innocous documents" (those the Government had agreed to return) were seized "in spite of the fact that they obviously were not included in *any* of the categories of items to be seized as contained in the warrant" (JA 19), and (3) the government's inventory of items showed that "nearly half or more of the seizure" was obviously beyond the bounds of the warrant. The court's ultimate finding cannot stand because its subsidiary findings are not substantiated by the record. Before we address these findings, we discuss the evidence concerning the general method of the search.

A. *The Method of the Search*

The testimony at the hearing on remand revealed that fifteen FBI agents conducted the actual search which

lasted 9½ hours.[8] In preparation for the search the agents attended several meetings to discuss and familiarize themselves with the areas and documents described in the search warrant and accompanying affidavit. They were instructed to confine themselves to these areas and documents in their search. (JA 542-43). During the search each agent carried with him a copy of the search warrant and its "Description of Property" and could contact one of the three persons on the scene who carried the supporting affidavit (JA 433, 484, 506, 651, 874). An Assistant United States Attorney (AUSA) was outside the building in a car to advise the agents on issues that might arise in the search, and on at least five occasions guided agents in their interpretation of the warrant. (JA 504-14).

During the search in the Fourth Floor suite specified in the warrant (JA 21) the agents examined 93 file drawers, fourteen desks, three bookshelves and numerous boxes and piles of loose documents. During the 9½ hour search by 15 agents (142.5 total agent hours) they seized 567 documents, which just filled two cardboard boxes measuring 18 inches by 18 inches by 12 inches (JA 204). This averages out to less than four documents for each hour each agent searched. Some documents that were originally seized by an agent were ultimately rejected, during the progress of the search, by a supervising agent and returned to the Church's files (JA 553-54). During the search Scientology representatives were allowed to be present in each room and to take notes and photographs. (JA 442-43, 464-72).

Richard Kimmel, the Scientology's Assistant Guardian for Information, testified concerning the details of the search that he observed:

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[8] An additional ten agents were present outside the building.

THE COURT: Well, are you telling me that the first agent who picked the documents up just took each document as he came across and gave them to another man?

THE WITNESS: No, not each document he came across, but from what I saw, each one he felt would be relevant, he gave over.

(JA 467).

I made the assumption at the time that they [the searching agents] were checking off against the warrant or the *itemization of documents on the warrant.* [This indicates a specific search not a general search.]

• • • •

Q. When you saw agents checking off against a list, did that list resemble the "Description of Property" [JA 32-39] that I showed you previously?

A. As close as I could get, which was within five or ten feet, I think it did.

• • • •

In another situation, the agent going through the jacket would call off the file number or file caption and the other agent *with the itemization* [the Description of Property in the warrant] might call out what documents were to be looked for in that particular jacket file. [Stronger testimony of a search for documents particularized in the warrant could not be produced.]

(JA 484 86) (Emphasis added).

Representative of the FBI testimony about the general conduct of the search is that of Special Agent Higgins:

I had a copy of the description of items in my hand and when I looked through an item I just tried to recollect what the affidavit set out and what the crimes were—and what the specific items were—and as I looked at the document I just would flip through and see whether or not it seemed to conform with

> what I was instructed to get pursuant to the search warrant, so I would review, as I went through, as I wanted to be sure that what I was taking seemed to be within the purview of the warrant.

(JA 550).

This and other testimony satisfies us that there is no tenable claim on this record that the agents were inadequately prepared or adopted a method of search that amounted to the general rummaging operation that the constitutional prohibition against general searches is meant to prevent. The agents were extensively briefed, instructed, and supervised. The court did not find, and there is no basis for finding, that the agents exceeded the geographical scope of the warrant. We thus conclude that the district court was clearly erroneous in ruling that the testimony describing the general operation of the search justified a finding that the search and seizure were unconstitutional.

B. *The Bases of the District Court's Decision*

1. The Agents' Seizure of "Innocuous" Documents

Clearly the dominant basis of the district court's finding of a general seizure was its construction that documents the government agreed to return were "innocuous." The court's reasoning seems to have been that from a mere reading of the description of the documents in the government's inventory, and the government's offer to return many "innocuous" items, the court could conclude that the entire search was beyond the limits of the warrant. On this basis the court ruled the seizure invalid in toto to avoid "more and more widespread abuse." (JA 17).

We find the district court's analysis deficient. First, the statements by the government attorneys, see notes 5 & 6 *supra*, did not amount to an admission that the

search warrant provided no support for the seizure of the "innocous" documents in the first place, and are no basis from which to conclude that the "officers [agents] . . . *willfully* exceed[ed] the scope of their authority under [the] warrant . . . ." (JA 15) (Emphasis added). The government was stating merely that the items to be returned were not necessary to the then anticipated criminal prosecution, or were cumulative of other evidence seized in the District of Columbia and at Scientology's headquarters in California. See notes 5-6 *supra*. (JA 21, n. 1). In resting its finding on its construction of the purported admissions of government attorneys the district court was clearly erroneous and abused its discretion.

Second, we find the district court's conclusion of a general seizure is unsupported by the testimony of the FBI agents of the reasons they seized particular documents, by the testimony of Kimmel, or by an independent analysis of the documents before the court.

The court first recited extracts from the testimony of agent Higgins that the agents conducting the search "were told to try to get Guardian Orders—relating to Guardian Order 1634." (J.A. 12). Higgins testified that if he "saw a compliance report to that Guardian Order, to [his] understanding of the crimes alleged, that seemed to establish a relationship to the item described in the generalized kind of description of an item [in the warrant] that would be pertinent." (*Id.*) This testimony does not support an inference of an exploratory search. The affidavit in support of the search warrant reported that Guardian Order "GO 1634 (Information Bureau activities re FOI), and others" were "file folders . . . [which] included some programs *directed against* governmental agencies . . ." (JA 63) (Emphasis added). And the warrant authorized the seizure of items relevant to:

153. Guardian Order 1634.

154. Any and all Guardian Orders issued pursuant to Guardian Order 1634 which would be identified as Guardian Order 1634-(number). [JA 38]

The rationale expressed in Higgins' testimony justified the seizures he made of GO 1634 items under the instant search warrant.

The second extract of Higgins' testimony related to the reasons he gave for seizing "certain items that were labelled Snow White." With respect to these items Higgins testified, "I would read the document over, and if it was something of that nature and there was a word in there that more or less, or a couple of words, or a phrase or paragraph in there that indicated that that particular Snow White document pertained to what would be characterized as overt [sic, should read "covert"] activity, I would take it." (JA 12). Full support for seizing such documents on such reasoning exists in the search warrant and supporting affidavit which is incorporated in the warrant. The search warrant commanded the agents to seize:

155. A Guardian Order generally identified as "Snow White".

156. Any and all Guardian Orders issued pursuant to the Guardian Order generally identified as "Snow White" which would be identified by the mention of "Snow White".

(JA 38). "Snow White" was also described in the supporting affidavit as one of the programs directed against governmental agencies. (JA 63). The illegality of the "Snow White" project was further substantiated by one of the "Snow White" documents that was seized. That document bears date 27 March 1976, covers 4 pages and is entitled "GUARDIAN PROGRAM ORDER" a "secret-

program"; "Snow White". It "reports" that "an excellent BI [Bureau of Information] success over the last year was the obtaining of *non-FOI data . . .*" (Emphasis added). The reference to "non-FOI," as disclosed above, referred to documents that were "covertly" obtained from the government by burglary or theft. (JA 61). See Tittle Affidavit, quoted at p. 2, *supra*. The same "Snow White" document also states:

> PLAN:
>
> To obtain all the secret files on Scientology that are not obtainable on FOI [Freedom of Information] lines . . .

(JA 187). A search cannot be justified by the criminality evidenced in seized documents, but when law officers seize an incriminating document, clearly tied to items designated in the warrant, there is no justification for suppressing it.

In further support of his seizure of items "related to Snow White," Higgins explained:

> Where I saw items that related to Snow White, I was working under the presumption that we were seeking evidence of criminal conduct, when Snow White is described in that affidavit as [the] main program directed against governmental agencies—which means the main things that were not quite on the up and up . . . . Because as I went over each document I read, understanding the violations that were being alleged, and I sought to see whether or not Snow White—that particular document that had Snow White on it—meant or related to activities which would have appeared to be criminal. [Tr. 224-225.]

(JA 12). This testimony indicates an exact knowledge of the items specified in the search warrant and of the rationale set forth in the supporting affidavit that justified the seizure of the Snow White documents. (JA

12). The quoted testimony of agent Higgins thus indicates a knowledgeable and proper exercise of his authority under the search warrant and does not support the court's ruling invalidating the search and suppressing all the seized documents.

The district court opinion next recites testimony by agent Joel Dean explaining his basis for seizing a pleading file in a lawsuit brought by Gregory Taylor. He testified that he took the document under item 162 of the warrant, quoted at p. 3 *supra*. Dean testified that Taylor's presence at the headquarters when the search was being conducted caused him to conclude that he could have been a participant in the Scientology's plan to obstruct justice *in regard to the theft of government property* [which 162 specifies]. Tr. 279. (JA 13). Dean also recalled that the Internal Revenue Service had originally arrested Taylor, mistaking him for one Wolfe, who had actually stolen some IRS documents. See Part VII *infra*. Whatever deficiency there may be in Dean's reasoning for seizing the pleading in the lawsuit, his action was directed at the designated purposes of the search and not some unrelated crime. This incident may reflect at most a negligent misinterpretation of the warrant; it does not furnish a basis for invalidating the entire search.

The district court's opinion also cites Dean's testimony that he seized some documents under the plain view doctrine. The document bearing computer No. 58287 pertaining to *codes* was specifically mentioned. This document listed various "codes—codes for different terms, names, and words . . . ." Dean testified he seized this document "because it would be a valuable key in the entire 161 items to understand them in their entirety":

> It's a listing of codes, and knowing the other 161 items could have codes, and after reading this, I selected this and seized this so we could interpret

> the other items that were seized in regard to the affidavit. [Tr. 323-325.]

(JA 13). Using this justification, and relying on the plain view doctrine, Dean seized a package of codes which accounted for 14 items in the government's inventory of seized documents.

We find that Dean's plain view seizure was lawful. Evidence of crime that comes into "plain view" of law enforcement officers during a lawful search may be seized even if they have no warrant to search and even if the crime was not that which justified the search. *Coolidge v. New Hampshire*, 403 U.S. 443, 465-66 (1971);[9] *Harris v. United States*, 331 U.S. 145, 154-55 (1947). *See United States v. Robinson*, 414 U.S. 218, 236 (1973); *see generally United States v. Johnson*, 561 F.2d 832 (D.C. Cir.) (*en banc*), *cert. denied*, 432 U.S. 907 (1977); *United States v. Reese*, 561 F.2d 894, 903 n.17 (D.C. Cir. 1977); *United States v. Mason*, 523 F.2d 1122, 1127 (D.C. Cir. 1975). It follows that officers armed with a search warrant for certain items may seize other items in plain view that are clearly tied to the crime alleged in the warrant. *Cady v. Dombrowski*, 413 U.S. 433, 448-50 (1973); *Marron v. United States*, 275 U.S. 192, 198-

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[9] *Coolidge* requires: (1) that the agents who make a plain view seizure must lawfully be at the site when they observe the matter in plain view and must make the seizure within the limits of the area where their presence is lawful; (2) an item that is not specified in a warrant must be sufficiently incriminating on its face to establish probable cause for its seizure despite the absence of its being mentioned in a warrant; and (3) the agent must come upon the unspecified item inadvertently. The requirement of inadvertence permits the agent to be validly searching the area or examining a document for evidence of another crime. *Abel v. United States*, 362 U.S. 217, 238 (1960); *United States v. Ochs*, 595 F.2d 1247, 1256-57 & n.8 (2d Cir. 1979).

99 (1927). This principle is fully applicable to searches for documents, even though the "plain view" of the contents occurred while the officer was inspecting documents to determine their significance. *United States v. Ochs*, 595 F.2d 1247, 1256-57 & n.8 (2d Cir. 1979) and cases cited. An earlier opinion to the same effect is *Abel v. United States*, 362 U.S. 217, 238 (1960). Dean thus gave a valid reason for his conduct in seizing the "code" material. The key to the code used in some of the documents authorized to be seized was definitely relevant and necessary to correctly interpret a great many of such documents. There is nothing insensitive in seizing a code book to de-code documents directed to be seized that turned out to be written in code. A search would not be reasonable if searches were required to seize documents that could not be interpreted.

The final item of testimony that the district court recited as justification for its suppression order was that of agent Charles Booth. He testified to the seizure of a document with a large "SW" on the top "which he took according to items 152, 155 and 156 of the warrant." Item 152 designates "GO 1361" for seizure and items 155 and 156 are the specific "Snow White" Guardian Orders quoted above. The supporting affidavit also indicates that Guardian Order "GO 1361 (IRS SW)" was one of the programs directed against governmental agencies. (JA 63). "IRS SW" would indicate the Snow White project against the Internal Revenue Service. Booth accordingly interpreted the SW as meaning " 'Snow White'. . . which was listed in the search warrant." The SW document also contained the notation "utilize BI for help in leads for discovery. . ." Booth construed this as indicating a plan by Scientology's Bureau of Information (BI) to attempt "to put a source within the FBI to obtain any information that they couldn't get or did get under the Freedom of Information." He concluded it came under the warrant's designation of Guardian

Order 1361 [Tr. 504-05] (J.A. 13). This indicates he understood the nature of the Snow White program as set forth in the supporting affidavit. The seizure of the document was authorized by the search warrant.

The testimony cited by the district court thus fails completely to make out any general rummaging operation. In most instances the agents were able to produce a satisfactory explanation of how they related the item they seized with a specific authorization in the search warrant. Read fairly, the testimony confirms the other testimony and circumstantial evidence, see Part III.A, *supra*, indicating that the agents took "care to assure that [their search was] conducted in a manner that minimizes unwarranted intrusions upon privacy." *Andresen v. Maryland*, 427 U.S. 463, 482 n.11 (1976).

2. The Seizure of Items Alleged to be Obviously Beyond the Scope of the Warrant

Nor is support for the district court's conclusion of a willfully overbroad seizure to be found in an independent evaluation of the seized documents before it. These documents were filed by Scientology at the suppression hearing to show that they were illegally seized and justified suppressing the entire search. I have examined each of these documents as well as any testimony of record relating thereto. What follows is a description of each document and reasons for seizing them under the designations of the search warrant. Transcript references are to any testimony concerning the exhibit and the item in the search warrant designating the item for seizure. The separate statement, p. 3-4, asserts that such review of the documents and the record is beyond the function of an appellate court. But when the record is clear an appellate court can interpret a document and a search warrant as well as a trial court.

(1) Exhibits 13-16, 34 includes a court pleading and papers in FOIA and constitutional tort cases. The agents were informed by the affidavit that Scientologists were engaged in a conspiracy that involved the stealing (and photocopying) of government documents. This information would permit seizure of court pleadings such as these, in which the United States was a party, since the pleading would then be in federal agency files and its appearance in the files of Scientology might evidence a theft of the agency files. This rationale is particularly relevant to FOIA cases and documents produced thereunder, for the additional reason that many such documents deleted significant information and Scientology's program of stealing documents might be directed at obtaining documents to fill in the gaps caused by redaction of such FOIA documents. Ex. 13, wherein Taylor, and not Scientology, is the private party, is discussed above.

(2) Exhibits 18-26 are documents listing a long series of code designations for various words. Conspirators use codes for the obvious purpose of concealing the nature of their activities. The codes were seizable under item 162 as "instrumentalities" of the alleged conspiracies and necessary to interpret code words used in designated documents. They were actually related to the specified documents that used the code words they identified and supplied their meaning.

(3) Exhibit 27 was seized under item 156 because it was labelled "Snow White." It outlines a plan to evict its enemy, Interpol, from the Treasury Building through legal action, i.e., a legal approach to accomplish a possibly illegal result—conceal the conspiracy.

(4) Exhibit 28 was taken under item 162. It discloses efforts to enlist churches in an effort to press Scientology's FOI demands. It is relevant to the conspiracy in that Scientology's covert operation was directly related to seizing the documents and obtaining the information

by illegal means that could not be obtained legally. The FOI program thus identified documents to be stolen if not obtained legally. If any person, including a church, with knowledge of the illegal aspects of the scheme, aided or abetted the plan, that person would be a potential defendant.

(5) Exhibit 30 was a Snow White item taken under 156. Indicative of its noninnocuous nature was the stated "Snow White Objective[]" of "uproot[ing] and cancel-[ing] all ["derogatory" and "false"] files and reports whenever found." It was clearly supportive of the conspiracies described in the search warrant.

(6) Exhibit 31, suggesting a plan to "obliterate" United States intelligence, was taken under item 162. Exhibit 32 is a copy of Exhibit 31.

(7) Exhibit 33 is a memo to "Mike" Meisner from "Mitch" which comes under designated item 159. It refers to allegedly false police reports about Scientology.

(8) Exhibit 35 is a one page memo of a cryptic nature. Government counsel stated at the hearing: "That particular document is not the entire document. There were attachments that made specific reference to stolen documents and it is not part of the exhibit." The court responded, "All Right." Tr. 346.

(9) Exhibit 36 apparently accompanied exhibit 35. No explanation is given for its seizure, although it was said to "concern[] the D.C. MPD investigation." (Tr. 346). The memo describes a District of Columbia Police Department report on L. Ron Hubbard (Scientology's founder) and does not clearly explain just how Scientology got it. The possibility that this police report was obtained by covert means supports its seizure as evidence supporting the described conspiracies.

(10) Exhibit 37 is a compliance report on Guardian Order 1634 and thus falls under designated item 153.

The magistrate found probable cause to seize all designated items and such finding is not successfully attacked here as to any designated document.

(11) Exhibit 38 has the initials "SW" on the left side of the paper. It mentions "FBI Coordination" and using "B-1" (the Bureau of Information) to "utilize every opportunity in discovery to gain further . . . data." It was seized under designated item 155 (Snow White).

(12) Exhibit 39 contains letters written among police officers about Scientology. They were seized under designated item 31: " 'Documents denied in entirety' [on FOIA request] comprised of correspondence between and among members of INTERPOL requesting and transmitting information concerning L. Ron Hubbard and Scientology." (From Description of Property, JA 33).

(13) Exhibit 40 is a compliance report on G.O. 1634 and thus fits under designated item 153. JA 38.

(14) Exhibit 41 is a Snow White FOI document, seized under designated item 155. JA 38.

(15) Exhibit 42 mentions both "SW" and G.O. 1634-3 and so falls under designated items 153 and 155. JA 38.

(16) Exhibit 43 is basically the same as Exhibit 41.

(17) Exhibit 44 is basically the same as Exhibit 41; it is a legal pleading in a Snow White Interpol FOI action.

(18) Exhibit 45, similar to Exhibit 39, was taken under designated item 31. JA 33.

(19) Exhibit 46 is an "SW" memo from one Scientologist to another. Paragraph 5 states that a visitor gave the writer "some documents last July pertaining to the RCMP [Royal Canadian Mounted Police] in Canada, and Interpol. Today he said these documents were 'lifted'

by [deleted], who got them out of the files, of RCMP." This document was taken under designated items 155 and 162. JA 38, 39.

(20) Exhibit 47 is an internal IRS memo ["Official Use Only"] taken under designated item 162 as a fruit and evidence of crime. It could well be stolen. JA 39.

(21) Exhibit 48 is a letter from Scientology to a law firm. The agent answered "don't know" as to why this item was seized. Tr. 562. The letter reports on investigations of Scientology by several nations' law enforcement agencies. It does not explain how all of this information was obtained and states "we have a number of investigations still in progress concerning this and other info which I will send to you directly about this FBI 'secret' data." Such reference corroborating covert activities was seizable in order to explain how the information on Interpol was obtained from government sources.

(22) Exhibit 49 consists of files released by the FBI in response to FOIA requests. This might indicate which files the Scientologists were interested in taking. It also might indicate what files they did not receive from a particular law suit and hence which files might be targeted from covert acquisition. It might also indicate redacted information that Scientology would attempt to obtain by covert means. Most of these are Snow White items seizable under designated item 155, although a lack of testimony as to exhibits 49-64 makes this conclusion uncertain. The record thus does not contain sufficient facts to order the return of these exhibits.

(23) Exhibit 55 is a series of letters which indicate that the Scientologists were aware of an English police report to which they had no authorized access. Evidence of an unlawful conspiracy to steal government documents in England may have some bearing on a similar

conspiracy to accomplish the same illegal objective in the United States.

(24) Exhibit 57 is apparently a "truth packet" prepared by Scientology to be sent to European law enforcement agencies. Its relevance, if any, may depend on the reference it makes to Interpol, which was one target of Scientology's unlawful conspiracies.

(25) Exhibit 58 is the report of a Scientologist who visited the Coast Guard to view files. As the supporting affidavit states, part of the unlawful conspiracy included a program directed against the Coast Guard.

(26) Exhibit 62 mentions agencies logged under 1634-1-1 project and thus could be seized under designated item 153 of the warrant, which refers to Guardian Order 1634.

(27) Exhibit 64 is the application of Mary Blevins for a job with Scientology, which was rejected, a notation indicates, "because of her State Department and CIA connections." Yet the application of Blevins does not mention these connections. Apparently the Scientologists knew about these connections because (1) she told them (Why were they interested?), or (2) she did not tell them but they knew from other sources (How?). The definite relevance to the described conspiracies is not spelled out, but Scientology's unexplained knowledge of her prior employment by the State Department and CIA would constitute some evidence that the covert action program of Scientology extended to those agencies. The supporting affidavit did refer to CIA documents stolen by Scientology agents that reported on drug operations in South America (JA 63. See also JA at 70 n.22.) The evidence of record does not disclose any basis for suppressing the document.

Each of the foregoing documents is one the Government voluntarily offered to return, except apparently the

document whose parts are marked Plaintiffs Ex. 35-36 and which is described above. The above analysis of these allegedly "innocuous" documents indicates that each of them may have some relevance either to the specific designated items in the search warrant that the agents were "commanded . . . to seize" (JA 21) or as evidence of alleged offenses outlined in the affidavit incorporated in item 162. The documents before the district court at the hearing were, at best, justification for suppressing only a small number of them, all of which the government had already volunteered to return; it manifestly was not justification to conclude the search and seizure were invalid *in toto*.

3. The Reliance on the Government's Inventory

The third and final basis for the district court's finding of a general seizure is its conclusory reliance on a "survey" of the FBI documents to find that about half of the documents seized could by "no stretch of the imagination . . . be regarded as within the designated categories of documents to be seized." (JA 14). The failure to cite specific documents or categories of documents makes this a finding worthy of no deference. Moreover, a survey of this type is inherently unreliable. The inventory contains only the title, and, at most, a one-sentence general description of each document seized. It does not purport to show why the document was seized, or to identify the search warrant item under which it was taken. As some of the individual documents in the above analysis indicate, a document with an innocuous format and title may contain passages which an agent in good faith could believe to be incriminating. In light of its inability to show that even a significant portion of its own selected sample of documents was seized unlawfully, we must reject as wholly unsubstantiated the district court's reliance on the FBI inventory.

C. *The Failure of Proof by Scientology*

In sum, the circumstantial, testimonial, and documentary evidence of record falls far short of demonstrating that the agents engaged in an unlawful general search. We acknowledge that law enforcement officials may in some cases exhibit such a disregard for the specific restrictions of a search warrant that an otherwise lawful search may be transmuted into a general search.[10] This however, has not been shown to be such a case. In shifting through well over a hundred drawers or boxes of documents, agents seized a total just filling two cardboard boxes. The uncontroverted testimony, corroborated even by the testimony of a Scientology official who was on the scene, is to the effect that the agents were guided in their search and seizure by continual references to the warrant and the incorporated affidavit. Finally, Scientology produced, at best, only isolated instances of arguably excessive seizures, and not any indication that the agents systematically exceeded the warrant or search for evidence of crimes other than those specified in the warrant. *Cf. United States v. Rettig*, 589 F.2d 418, 422-23 (9th Cir. 1978) (search ostensibly for marijuana actually a search for cocaine).

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[10] *See United States v. Rettig*, 589 F.2d 418 (9th Cir. 1978) ("the agents did not confine their search in good faith to the objects of the warrant, . . . [which] became an instrument for conducting a general search."); *United States v. Fernandez*, 430 F. Supp. 794, 801 (N.D. Calif. 1976) (defendants objecting to introduction of items seized under the descriptions in the warrant must show that "the seizure of the undescribed items or other misconduct in the search rendered the entire search unreasonable.") *See also Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, (1979) (items may not be seized pursuant to an open-ended warrant to be completed as search is conducted).

IV. Appropriate Remedy

We also disagree with the district court's conclusion that in this case seizure of some items not authorized by warrant or by the plain view doctrine requires as a remedy the suppression and return of all items seized. On this point the law is clear. Several circuit court cases that have directly addressed the question whether some extra-warrant seizures justify suppression or return of documents seized in conformance with a warrant fully support the severable nature of such seizures: while extraneous items seized must be suppressed, designated items may be retained.

In *United States v. Forsythe*, 560 F.2d 1127 (3d Cir. 1977), where the warrant authorized a search of the business records of a bail bond agency for bail bond application forms, books, records, cancelled checks, correspondence and related papers, the agents seized a metal safe containing jewelry, cash, receipts and cancelled checks. The cash, jewelry and some relevant papers were returned voluntarily. On such facts the Third Circuit held that the illegal seizure of the non-warrant items did "not justify suppression of highly probative evidence consisting of those documents and records which were legally seized pursuant to the warrant." *Id.* at 1134.

An even stronger case upholding severability is *United States v. Cox*, 462 F.2d 1293 (8th Cir. 1972) involving a seizure (wire tapping) where there was a failure to "minimize" as to some irrelevant conversations. Appellant contended that all conversations so obtained should be suppressed. It was ruled, however, that the proper remedy was to exclude the extraneous conversations and admit those "the warrant contemplated overhearing." 462 F.2d at 1301. The scope of the remedy for failure to minimize in *Cox* is applicable to a Fourth Amendment case like ours. *Cf. Scott v. United States*, 436 U.S. 128 (1978), *aff'g* 551 F.2d 467 (D.C. Cir.); *United States*

v. Scott, 516 F.2d 751 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 917 (1976).

The Ninth Circuit applied the severability rule in *United States v. Daniels*, 549 F.2d 665 (9th Cir. 1977), rejecting

> the notion that the invalid seizure of . . . letters 'tainted' the rest of [a] search [for marijuana]. The exclusionary rule does not require the suppression of otherwise legal seizures merely because they were part of the same search in which an illegal seizure occurred. . . . *Wong Sun's* "taint" reaches items derived from unconstitutional behavior, not items derived from constitutional behavior even when contemporaneous with that which is unconstitutional.

Id. at 668.

The Fifth Circuit, in another case involving a marijuana search, *United States v. Mendoza*, 473 F.2d 692, 696-97 (5th Cir. 1973), held:

> Though in executing the warrant the officers may have seized items which were not within the scope of the warrant, that does not affect the legal seizure of the items which were within the scope of the warrant. Brooks v. United States, 416 F.2d 1044 (5th Cir. 1969), *cert. denied*, 400 U.S. 840 (1970).

In the *Brooks* case cited in *Mendoza*, the warrant had specified stolen property and "numerous tools suitable for use in burglaries," including "a cutting torch." The stolen property was described as the proceeds of two specified bank robberies. However, FBI agents also seized various articles of clothing, toilet articles and "the like." The court ruled that "[t]he legal seizure of the articles described was not affected by the seizure of additional articles not described." *Id.* at 1050.

Four cases in the Second Circuit also reach the conclusion that searches are severable and that seizure of

items not covered by the warrant does not necessarily taint the proceeding so as to require suppression of every item seized. The warrant in *United States v. Dzialak*, 441 F.2d 212 (2d Cir. 1971), was issued to search for stolen property in the home of a suspect. "Binoculars" were specified, but the agents seized 21 Timex watches, three opera glasses, two microscopes and seven telescopes, all of which had been stolen. The court reversed the conviction on the count for possession of the stolen watches but affirmed on the count involving the optical equipment on the theory that such items were sufficiently related to binoculars. Implicit in this result is the holding that the unlawful seizure beyond the items specified in the warrant does not necessarily invalidate the seizure made within the warrant.

The next search case in the Second Circuit held that the seizure (wire tapping) of conversations beyond the hours authorized for interception exceeded the authorization and should be suppressed, but the suppression of all conversations was not required. *United States v. Principle*, 531 F.2d 1132 (2d Cir. 1976). A third case, involving a search incident to an arrest, which is relevant by analogy, is *United States v. Artieri*, 491 F.2d 440, 445-46 (2d Cir.), *cert. denied*, 419 U.S. 878 (1974). Therein police made a valid warrantless arrest of a narcotics dealer in his home while he was preparing heroin for sale. Heroin within his control was seized and thereafter the officers searched the residence and seized other contraband, which was not introduced at trial. The defendant's argument that the unconstitutional search of the residence justified complete exclusion of all evidence seized was rejected. The court aptly stated the law: "evidence lawfully seized as incidental to an arrest is not transmitted into an unlawful seizure by a subsequent unconstitutional seizure made in the same case." *Id.* at 445.

Finally, in *United States v. Dunloy*, 584 F.2d 6 (2d Cir. 1978), the Second Circuit held that, where police seized some personal papers when searching a safety deposit box for evidence of cocaine, the remedy with respect to any seizure which exceeded the scope of the warrant was not to invalidate the entire search but merely to suppress the excess items.

In this circuit in *Huffman v. United States*, 470 F.2d 386, 390 n.3, 393 n.7 (D.C. Cir. 1971),[11] we ruled that a seizure pursuant to a warrant directed to "the magazines 'Modern Girls' and 'Girls' as well as other magazines of a similar appearance and contents" did not authorize seizure of the book "Female Auto-erotic Practices" and three rolls of 8 mm. film. Our decision there implicitly recognized the severability of legally seized from illegally seized evidence and did not require the suppression of the magazines seized under the warrant because of the seizure of the book and film outside the warrant. *Id.* at 393 n.7.

The Supreme Court indicated its approval of the severability approach in *Andresen v. Maryland*. *Andresen* involved two searches—one of a lawyer's office, the other of his associated real estate business corporation. The search warrant authorized police to seize evidence of a specific crime of false pretense involving a single real estate lot, Lot 13T. In the search of the corporation 52 items were seized. The State voluntarily returned 45 items, and at the hearing the trial court suppressed six other items "on the ground that there was *no connection* between them and the crimes *charged*." 427 U.S. at 467 (Emphasis added). The net result was that only *one item* out of 52 seized in the search of the corporation's office was not returned or suppressed. The

[11] We reversed *Huffman* on rehearing on other grounds in light of intervening Supreme Court obscenity decisions. 502 F.2d 419 (1974).

law office search resulted in the seizure of 28 items. Of these the State returned seven and the trial court suppressed four items "on its determination that there was *no connection* between them and the crime *charged*." *Id.* at 467 (Emphasis added). Thus out of a total of 80 seized items, 52 were returned and 10 suppressed—leaving a net of 18 items that were retained—22.5%.[12] In the course of its opinion the Supreme Court adverted to the execution of the search warrants:

> The record discloses that the officials executing the warrants seized numerous papers that were not introduced into evidence. Although we are not informed of their contents, we observe that to the extent such papers were not within the scope of the warrants or were otherwise improperly seized, the State was correct in returning them voluntarily and the trial judge was correct in suppressing others.

Id. at 482 n.11. *Andresen* thus supports the procedure of permitting the government to return voluntarily the items seized that are not relevant to the charge and to retain all items seized in accordance with the warrant—

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[12] Included in the 18 were "documents relating to a lot *other* than Lot 13T [which were objected to as] not relevant to the Lot 13T charge and were admissible only to prove *another crime* with which he was charged *after* the search." 427 U.S. at 462 (emphasis added). The Supreme Court ruled that the evidence relating to the *other crime* was properly seized:

> Although these records [relating to a lot other than lot 13T] subsequently were used to secure additional charges against petitioner, suppression of the evidence was not required. The facts that the records could be used to show *intent* to defraud [a consistent pattern of conduct relevant to intent] with respect to Lot 13T permitted the seizure and satisfied the requirements of *Warden v. Hayden*.

Id. at 462 (Emphasis added). The records relating to a lot other than lot 13T were obviously seized under the plain-view doctrine.

even where 51 out of 52 seized items were returned or suppressed.

Our prior opinion in this case reflected the advisory language in *Andresen* in informing the district court that "documents seized in the search by the agents exceed[ing] the bounds of the search warrant should be returned," but documents "relevant to the particularized offenses and which are specifically referred to in the affidavit and search warrant[] should be delivered to the government forthwith." 572 F.2d at 327. The district court, in ordering the wholesale suppression and return of the documents in disregard of this directive, cited not one case in favor of its position. Rather, it sought to distinguish cases tending to support a severability approach.

Scientology cites cases that do support wholesale suppression, but on facts far removed from those present here. In *United States v. Rettig*, 589 F.2d 418 (9th Cir. 1979), the entire fruits of the search were suppressed because (1) the agents unreasonably exceeded the limitations of the warrant and searched for evidence not shown on the face of the warrant and (2) "it was not possible for the court to identify after the fact the discrete items of evidence which would have been discovered had the agents kept their search within the bounds permitted by the warrant." *Id.* at 423. Neither circumstance is present here. In other cases cited, such as *United States v. Burch*, 432 F. Supp. 961 (D. Del. 1977), *aff'd mem.*, 577 F.2d 729 (3d Cir. 1978) and *Application of Lafayette Academy, Inc.*, 462 F. Supp. 767 (D.R.I. 1978), *aff'd*, 610 F.2d 1 (1st Cir. 1979), the search *warrant* was held to be invalid as a general warrant. Here, by contrast, the search warrant has been held to be facially valid. Only its execution is at issue. Thus, in the cases cited by Scientology, what was involved was not a basically sound search and seizure

with improper seizures of some items, but warrant language so general or police conduct so offensive that the court found the officers had engaged in an impermissible exploratory search. The search here was not unlawfully exploratory since the agents searched for designated documents, seized some documents in plain view that were relevant to the designated offenses or documents, and did not generally explore for documents outside the offenses or documents specified in the warrant.

It is apparent from the above cited case law that the record here does not justify a ruling that *all* items seized must be suppressed and returned.

V. Facial Validity of the Search

Urging an alternative basis for upholding the district court's wholesale suppression order, Scientology invites us to reconsider our prior holding that the search warrant was facially invalid. Scientology contends that the warrant, read in light of the agents' interpretation of it, is too vague and overbroad to withstand scrutiny. We reject that contention. We adhere to our holding that the warrant is valid on its face. Our examination of the record, including the agents' preparation, their conduct during the search, and the low percentage of documents they seized (as opposed to those they necessarily perused),[18] only confirms our impression that

[18] In *Andresen v. Maryland*, 427 U.S. 463 (1976), the Supreme Court rejected an argument that a search warrant was unconstitutionally general where police seized from two to five percent of the files in the rooms searched and where 65% of the items seized were voluntarily returned and another 12.5% were suppressed. *Id.* at 466-68, see TAN 10 *supra*. The figures here are comparable. It appears the agents took two 12"x18"x18" boxes of documents from rooms containing well over a hundred boxes, desk drawers, and file cabinet drawers. (JA 204). According to the inventory by computer 63% of the items were offered to be voluntarily returned by the

"[t]he recited facts and designations of property and offenses impose particular limits upon the search warrant . . . ." 572 F.2d at 326.

VI. Probable Cause for the Warrant

In our prior consideration of this case, we stated our "agree[ment] with the finding of the United States Magistrate that the affidavit did show probable cause." 572 F.2d at 326. We remanded, not for a hearing on whether probable cause supported the warrant, but, inter alia, for a hearing on whether the factual statements were stale, a question relevant only if probable cause is first established. We decline Scientology's invitation to depart from our prior determination. The inclusion of each of the 162 items in the search warrant is supported by a reading of the affidavit or its accompanying "Source of Documents" sheet; each was a fruit, instrumentality or evidence of a specified crime.

Scientology makes the further contention that there was no justification for searching any office but the Information Bureau in its building. Scientology Br. at 25-28. Scientology concedes that the search warrant designates "the Fourth Floor . . . [housing] the offices of the P. R. Bureau, the Information Bureau, the Legal Bureau and the Assistant Guardian's office . . . ." (JA 21), but disputes that there was probable cause for a search of that breadth. The supporting affidavit, however, states "that the *guardian's offices* and their operational and *administrative bureaus* in the Church of Scientology have maintained files containing documents reflecting *all* activities of the church . . . since inception of the Guardian's Office in 1966" (JA 61). (Emphasis added). And

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government. (JA 128). Scientology's failure to challenge specific documents that the government wanted to retain leaves us with no basis for determining that any of the retained items were seized unlawfully.

all of the Bureaus designated in the warrant that were searched in the same suite of offices and were under the "Assistant Guardian D.C.," including the "Assist. Guardian Finance." (Organizational Chart," JA 74).[14] The affidavit thus supported probable cause to search all the offices from which documents were seized, all of which were in the Fourth Floor area specified in the affidavit and warrant. The single door leading to the suite bore the sign "Office of the Assistant Guardian," and only one door to the offices inside the suite bore a descriptive sign indicating the office of the occupant.[15]

VII. The Claim That The Supporting Affidavit Was Based On Stale Information

Scientology also contends in its cross-appeal that the information supporting the warrant was stale and failed

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[14] The affidavit also lists the following five bureaus as being part of the "Guardian World Wide"—"Information, Public Relations, Legal, Finance and Social Coordination." (JA 42).

[15] Indeed, probable cause existed to search not only the Information Office but also the other designated bureau offices of Scientology in the District of Columbia. And, the supporting affidavit would have justified a broader search within Scientology's files for the "plans, scenarios and directives" (*id.*) prepared in furtherance of the conspiracy to obstruct justice by suborning Meisner and Wolfe to testify falsely before the grand jury. The supporting affidavit, which was incorporated into the search warrant, states specifically that "officials of the Church of Scientology conspired to obstruct justice by preparing a false response to expected inquiries of Meisner and Wolfe by law enforcement authorities and federal grand juries; that *plans, scenarios and directives* were committed to writing in furtherance of this conspiracy, that such writing are secreted in *the files of the Church of Scientology* in Los Angeles, California, and *Washington, D.C.* . . ." (JA 71). (Emphasis added). Therefore the searchers were not limited to the files of the Guardian Office or the Information Bureau in Scientology's Washington office in searching for these *designated documents* as the Separate Statement states in footnote 1.

to support a finding of probable cause to search for the documents in the District of Columbia. There is no merit to either point and the district court was not in error in rejecting such contentions.

The affidavit in support of the search warrant was executed by Special Agent Tittle on July 4, 1977 and the search was conducted on July 8, 1977. It quoted extensively from information furnished in June 1977 by Michael Meisner, who had achieved high office in Scientology's heirarchy. Starting as a staff officer, Meisner became Assistant Guardian for Information and then National Secretary for Information (JA 43, 63). Through his positions of high responsibility he acquired firsthand information of Scientology's most sensitive operations and method of keeping records. (JA 43). Moreover, as an actual participant, he had firsthand knowledge of the burglaries and other covert operations. In fact, most of the government documents that were covertly obtained in 1975-76 bear his signature ("Mike"). (JA 61).

According to the sworn affidavit, in mid-1976 Meisner and Gerald Bennet Wolfe, a Scientology agent in the employ of the Internal Revenue Service, were discovered while preparing to steal documents in the United States Courthouse in Washington, D.C. (JA 53-54). Anticipating the indictment of Meisner and Wolfe, Scientology officials conferred with them to fabricate consistent perjured testimony for the grand jury. (JA 57). Wolfe was arrested and testified in accordance with the scheme, while Meisner, pursuant to the plan, went into hiding. In April 1977, when Meisner told Scientology officials he wanted to return to D.C., he was held against his will, although he retained continuing access to confidential information concerning Scientology. (JA 60). After a substantial period of confinement Meisner escaped and notified the authorities on June 20, 1976 that he wanted

to cooperate in the ongoing investigation of the government office burglaries he had helped to perpetrate. (JA 60). The information he then provided is the basis of the Tittle Affidavit.

This information, if not stale by the time the FBI acted on it, furnished overwhelming probable cause to search the D.C. offices of Scientology. Meisner reported that he personally filed copies of covertly obtained documents at the Scientology's D.C. office (JA 48), and that they were retained in the fourth floor office of the Assistant Guardian for Information (JA 52). This office maintained files of documents similar to those in Los Angeles (JA 69). The affidavit reports Meisner as relating:

> [S]ince many of the government agency documents maintained in Los Angeles were acquired through the efforts of D.C. operatives, and since copies were always retained in the D.C. Bureau, copies of the self-same documents are filed in both locations.

(JA 69). In addition the affidavit stated that the operational and administrative bureaus had files (JA 61); the Finance office in D.C. received copies of stolen documents (JA 69); it was the practice in Scientology's offices for the files to follow the personnel (JA 64, 67, 68); "plans, scenarios and directives [were] . . . secreted in the files of the Church of Scientology in . . . Washington, D.C.," and "copies of [the] summary of [Wolfe's false grand jury testimony] were secreted in the offices of the Church of Scientology in Los Angeles, California and Washington, D.C." (JA 71).

The question remaining is whether the information was stale, thus vitiating the probable cause that would otherwise exist. Meisner related to the affiant, agent Tittle, that he heard in June 1976, shortly after Meisner and Wolfe were confronted by FBI agents in the United States Courthouse, that the relevant D.C. files had been

U.S.C. § 3109.[17] A failure to comply with section 3109 would lead to the return or suppression of the item wrongfully seized. *Sabbath v. United States*, 391 U.S. 585 (1968); *Miller v. United States*, 357 U.S. 301 (1958).

At the inception of the search the first agent announced his presence and identity, showed the search warrant to the employees of Scientology there present, and announced the purpose of the intrusion. (JA 536-37).[18] Agents reaching the fourth floor office of the Assistant Guardian encountered a locked door, at which they knocked and announced their purpose. Scientology official Gregory Taylor acknowledged the knocks but refused for four or five minutes to open the door. Believing that the Scientologists had a paper shredder on the premises, the agents used a carbide saw to gain entry. Taylor then shut and locked one of the inner office doors, which the agents also broke open. Other doors were similarly opened after consultation with an Assistant United States Attorney waiting outside the building. *At no time did any Scientology official tender a key for any door or file cabinet within the Fourth Floor suite*, although they were heard to discuss among themselves the merits of doing so.

Assuming arguendo that section 3109 applies beyond the context of a private dwelling and to the opening of

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[17] 18 U.S.C. § 3109 provides:

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

[18] Scientology does not argue that the original entries into the building and the Assistant Guardian's suite were improper. Scientolgy Br., 43.

removed from D.C. headquarters for safekeeping in a private residence. (JA 70). In late March 1977, however, Meisner learned from the Scientology official in charge of the files (the Southeast Secretary of the U.S. Information Bureau of Scientology) that the files had been returned to the office of the Assistant Guardian for Information at 2125 S Street, N.W. In light of the character of the crime described in the affidavit (an elaborate and ongoing conspiracy to collect stolen documents), the highly organized nature of Scientology's operation and record-keeping system, and the practice of keeping the files where the officials could use them, we find the magistrate acted reasonably in concluding there was a probability that documents reliably reported to repose at Church headquarters three months before would still be there. *See Andresen v. Maryland*, *supra*, 427 U.S. at 478 n.9.[16]

VIII. The Alleged Violation of 18 U.S.C. § 3109

Scientology also contends the district court erred in failing to rule that the search by the agents violated 18

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[16] The *Andresen* Court disposed of an analogous staleness claim:

> It is also argued that . . . a three-month . . . time lapse precluded a determination that there was probable cause to believe that petitioner's offices contained evidence of the crime. This contention is belied by the particular facts of the case. The business records sought were prepared in the ordinary course of petitioner's business . . . . It is eminently reasonable to expect that such records would be maintained in those offices for a period of time and surely as long as the three months required for the investigation of a complex real estate scheme. . . . All this, when considered with other information demonstrating that [the subdivision in question] was still a current concern of petitioner, amply supports the belief that petitioner retained the sought-for records. [*Id.*]

office file cabinets, we hold that the requirements of the statute were met. Persistent obstructionist behavior by Scientology officials, plus their subsequent failure to provide keys, amounted to a continuing "refus[al] [of] admittance" within the meaning of the statute. We therefore affirm this portion of the district court's judgment.

IX. The Claim of Entitlement to a Franks v. Delaware Hearing

The final contention of Scientology is that the district court erred in denying it an evidentiary hearing in which to test the veracity of the allegations in the Tittle Affidavit, in accordance with the then-recent holding of *Franks v. Delaware*, 438 U.S. 154 (1978):

> where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and . . . [the falsehood was material to the finding of probable cause,] the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

Id. at 155-56. In attempted compliance with this procedure Scientology presented to the district court affidavits purporting to show that the Tittle Affidavit was materially and intentionally false (1) in stating that "non-FOI" documents were those obtained covertly; (2) in implying that the Snow White program had illegal aspects; and (3) in stating that Meisner learned from a

Scientology official in March 1977 that the relevant files had been returned to Scientology's D.C. headquarters.

Even were we to read the Scientology affidavits as truly controverting the allegations in the Tittle Affidavit, we are not persuaded the district court erred in denying the request for an evidentiary hearing. At most, the affidavits showed that Meisner gave false information. They do not amount to a "substantial preliminary showing that a false statement [was included] knowingly and intentionally, or with reckless disregard for the truth, . . . *by the affiant*"—Tittle. *Id.* at 155-56 (Emphasis added). As the Supreme Court went even further to make clear, "[t]he deliberate falsity or reckless disregard whose impeachment is permitted . . . is only that *of the affiant, not of any nongovernmental informant.*" *Id.* at 171 (Emphasis added).

X. The Remand to Consider the Return of Individual Documents

The majority, following submission of the foregoing opinion and the conclusion, have filed a separate statement (Sep. Stmt.) in which they direct a remand to afford the district court a third opportunity to consider whether individual documents were seized beyond the scope of the search warrant and accompanying affidavit.[19] In my view the litigation ought to end now rather than provide this third opportunity to consider the documents separately. Our earlier decision, which is the law of the case, *In Re Search Warrant*, 372 F.2d 321, 327

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[19] It is incorrect for the majority to assert that Scientology has not had "at least one opportunity to indicate to the district court whether any particular documents must be returned because they fall outside the scope of the warrant and were not properly seized under the plain view exception to the warrant requirement." (Sep. Stmt. p. 1).

(D.C. Cir. 1977), *rehearing en banc denied*, January 4, 1978, *cert. denied*, 435 U.S. 925 (1978), recognized the right of Scientology to have any document returned that exceeded the search warrant "as construed in [said] opinion." This authorized "the court to consider and determine whether any specific document may have been seized outside the authority of the search warrant as construed in this opinion." 572 F.2d at 327. Yet Scientology in both prior hearings failed to introduce any seized documents and thereby must be considered to have abandoned its claim for the return of any document except the substantial number of documents the government previously indicated it intended to return. The California court ruled similarly with respect to the Scientology's similar tactics with respect to its attack on the California search,[20] which was made under an identical search warrant. Recognizing this fact, Scientology's counsel, in a memorandum filed with the court in this case stated "that the warrants the government seeks to keep from the D.C. documents are almost entirely duplicated in the Los Angeles documents which have already been released to the government." Scientology Memorandum,

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[20] "Petitioner [Church of Scientology] apparently decided for its own reasons not to proceed on either of . . . two sub-issues: . . . (a) did the FBI agents seize documents from areas not covered by the warrants, and (b) were *certain seized documents* not within the warrants' specific descriptions of the items to be seized? . . . Petitioner elected not to introduce any of the seized documents and *thereby to abandon its contention that particular documents were illegally seized.* Petitioner has been offered numerous and ample opportunities to present its contention that individual documents were illegally seized; it will not be heard to raise this abandoned issue once again. Accordingly, its request for a hearing on this issue is denied." (Emphasis added) (Footnote omitted) Memorandum of Decision, U.S. District Court, C.D. Cal., No. CV-77-2565-MML, July 21, 1978, Court file, No. 63; p. 3, 8.

June 2, 1978, Court file, No. 54, p. 12. This may account for its failure to introduce any of the seized documents in this case. Instead it appears that Scientology elected to focus exclusively on theories that would justify suppression of the *entire* seizure. Having foregone its opportunity to introduce or proffer evidence to justify the suppression and return of particular documents, while proceeding with its more ambitious claims, Scientology must be deemed to have waived and abandoned any demand for the return of individual documents (although of course it remains entitled to the documents the government has volunteered to return when the court proceedings no longer require them). Scientology obviously made a strategic decision to forego one, limited form of relief while seeking broader forms. They may still seek to pursue this broader point by certiorari, though certiorari was denied by the Supreme Court, 435 U.S. 925, on Scientology's petition attacking the earlier decision upholding the validity of the search warrant on the authority of *Andresen v. Maryland*, 427 U.S. 463 (1976). *Id.*, at 327. *Cf.*, separate opinion of Judges Wright, Bazelon and Leventhal at 572 F.2d 329. It is not for this court to compel counsel to reverse its earlier decision and impose on the district court and all parties concerned the burden of litigating a claim once abandoned and which appears to be essentially frivolous if, as Scientology's memorandum states, the remaining documents are "almost entirely duplicated in the Los Angeles documents" which have "been returned to the government."

Our opinion and order in *In re Search Warrant*, *supra*, mentioned four challenges to the search that might be raised on remand: (1) an overbroad search, (2) use of unnecessary force, (3) reliance on stale allegations of fact, and (4) seizure of "any specific document . . . outside the authority of the search warrant as construed in this opinion." 572 F.2d at 327, 328. On the first day of the hearing on remand (April 21, 1978), counsel for

Scientology stated there were "four legal arguments as to why the materials that have been seized by the Government should be returned." (App. 363). These were (1) staleness of the search warrant, (2) failure to serve the affidavit, (3) use of unnecessary force, and (4) "the individual documents." (App. 363-66). (Scientology has since raised other grounds. See, e.g., parts VI, IX *supra*.)

The "individual documents" claim was not pursued at the hearing. Scientology thus confined its claim to three points that attacked the entire search. Counsel for Scientology reported that they had "not been able to conform to the Court's request that we give to the Court our list of those documents we think should be returned as opposed to what [the government] might otherwise keep if the warrant itself is valid." (App. 366). Counsel explained that the government had been slow in submitting its *listing of what it intended to keep* and that it had failed to supply document numbers corresponding to the document descriptions that appeared on the inventory and on the documents themselves. (App. 366-67).

Nothing, however, precluded Scientology from listing by document number the items it claimed to be *outside* the authority of the warrant. In fact, in papers filed two weeks later Scientology did list five "non-return" items it claimed were beyond the search warrant (Status Memorandum of the Founding Church of Scientology at 3 (May 5, 1978)). Even then, however, counsel indicated it sought to *avoid disclosure* of the contents of some documents in stating that inquiry into an unspecified number of documents would be avoided to avert "undue disclosure of confidential Church documents." (*Id.*) This is apparently the real reason that Scientology did not press the point. But lack of time was no longer an excuse when, on June 30, 1978, the district court informally told the parties that it would conduct no fur-

ther hearings in the matter but would give each side an opportunity to submit *any additional pleadings it desired.* Scientology was thus afforded a complete opportunity to present its claim that any specific documents were seized illegally. But three weeks passed and in its July 21 response, the government noted that three months had elapsed since Scientology had professed itself unable to produce a list of the documents it claimed were seized unlawfully, "much less a statement of reasons supporting its challenges." (Proffer of Testimony and Exhibits and Memorandum of Law in Response to Informal Court Order of June 30, 1978 at 26, JA 185.) The government concluded that

> Under these circumstances, petitioner must indeed be deemed to have abandoned its challenge to the individual documents, just as the Church of Scientology of California did in the related matter before Judge Lucas.

(*Id.*)

Judge Lucas' decision involving the documents search at Scientology's California offices, see note 1 *supra*, also stated:

> Petitioner [Church of Scientology] apparently decided for its own reasons not to . . . introduce any of the seized documents, or any other evidence to prove . . . . that seized documents were not included in the list of property to be seized. Instead, Petitioners abandoned its prior contentions and unveiled a completely new theory.

Church of Scientology v. United States, No. CV-77-2565-MML, slip op. at 7 (C.D. Cal. July 5, 1978), *appeal dismissed*, 591 F.2d 533 (9th Cir. 1979).

For similar reasons the district court should have held that Scientology abandoned its individual documents claim here, where, again for reasons of its own, Scien-

tology seemed to take an "all or nothing" approach, and persistently failed to proffer any evidence to support a claim to the return of individual documents. Indeed, the most reasonable interpretation of the district court's opinion is that it reached just such a holding in "rul[ing] against petitioner *on all other grounds.*" (JA 19) (Emphasis added). The government had argued to the court that Scientology abandoned its individual documents claim, and Scientology had made no meaningful reply thereto. On this point Scientology simply stated that "The government's reply herein merely argues with the statements previously made by the petitioner in its memorandum and does not require further argument herein with the exception of two points," neither of which was germane to abandonment. Petitioner's Reply to Government's Proffer of Testimony and Exhibits and Memorandum of Law in Response to Informal Court Order of June 30, 1978 at 13 (July 31, 1978).

Petitioner's previous memoranda, however, were no more precise in maintaining any claim that the court should order the return of any specific documents the government sought to keep. Indeed, Scientology's interest in individual documents by all appearances was always coextensive with its interest in a holding that the entire search was exploratory in nature and that therefore *all* documents must be returned. For example, in its Memorandum in Response to Government's Reply of May 11, 1978 (June 2, 1978), counsel for Scientology characterized the four claims it raised at the first day of the remand hearing as claims

> [1] that the warrant was stale; [2] that the government used excessive force in the search; [3] that the government failed to make adequate service . . . of the affidavit with the search warrant; and [4] that *the search warrant was overbroad* in violation of the Fourth Amendment both as to the geographical area searched and *as to the documents seized.*

Id. at 6 (emphasis added). Three of these claims coincided with issues we referred to in our earlier opinion calling for a remand but a claim of inadequate service of the search warrant was substituted for an attack on any "specific document . . ." p. 2, *supra.* The last claim is clearly *not* a demand for the return of specific documents but a claim that the whole search was overbroad and so many documents were unlawfully seized that the seizure must be deemed invalid in toto. The point is repeated at 12-13 of the Scientology memorandum of June 2, 1978:

> Four [of] the five grounds upon which petitioner originally objected to the July 8, 1977 search of Church premises have not been ruled upon by this Court. Petitioner has asserted that:
>
> . . . .
>
> (4) The warrant *and search* were overly broad in that the affidavit supplied *no probable cause* to: (a) search offices other than the Information Bureau; or (b) *seize most of the items enumerated numbers 1 through 161 in the "Description of Property."*

(Emphasis added.) Again, by negative but necessary implication, Scientology was not pressing any claim for the return of individual, specified documents, but instead again presents an argument that *avoids disclosure* of specific documents. Some inquiry into individual documents would be germane to the issue of exploratory seizure, of course, but it is clear that Scientology's sole goal was wholesale suppression, not the return of specific documents the government still wanted to keep.

In the light of Scientology's assertions before the district court the government submits that Scientology abandoned any individual documents claim, and that we should interpret the district court's ruling as holding against Scientology on all but one of its claims. Scien-

tology did explain at one point that it was the district court that wanted to confine the inquiry to items the government had already agreed to return. *Id.* at 6. But in light of its exclusive emphasis on broad contentions that comment reffects only Scientology's interest in using all evidence possible to pursue its "all or nothing" claim of exploratory seizure, and not an interest to pursue an order for the return of specified documents. In any event, Scientology was given a full opportunity to submit any additional pleadings it desired and cannot now complain of any such court-imposed limitation when it has not appealed from it. And this court's present *sua sponte* remand on this point is irregular and its basis is unfounded. Although Scientology appealed from apparent adverse rulings on the staleness, probable cause, excessive force, and evidentiary hearing issues, see parts VI-IX *supra*, it raised no point on appeal concerning any individual documents claim. It thus waived any complaint about the district court's conduct in relation thereto.

In short, although we recognized Scientology's right to seek the return of specific documents seized beyond the authority of the search warrant, and although we remanded for a hearing on that point, among others, Scientology failed to take advantage of that opportunity and therefore abandoned any claim to the return of individual documents. That much is clear, in my opinion, from the parties' submissions to the district court. A party's persistent failure to pursue a claim is grounds to conclude it has abandoned it. *Church of Scientology v. United States, supra; see Foremost International Tours, Inc. v. Qantas Airways Ltd.*, 478 F. Supp. 589, 602 (D. Haw. 1979); *Dawson v. G. Malind, Inc.*, 463 F. Supp. 461, 465 (S.D.N.Y. 1978). To the extent that Scientology can complain that the district court somehow tied its hands in this matter, it was incumbent upon Scientology to protest below and to raise the point here.

It did not take advantage of this opportunity. In its May 5, 1978 status memorandum Scientology merely stated that the seizure was invalid because "the documents are not evidence of criminal activity, but private, protected writings." Record, Vol. II, #43, p. 2. Such defense is a non-sequitur. Scientology also couched whatever claim it did make so that "undue public disclosure of confidential church documents can be avoided." Thereafter Scientology had more than an ample opportunity, as pointed out above, to submit any claim it had for the return of specified documents when the court on June 30, 1978 offered the parties an opportunity to submit *any* additional pleadings they desired. *Supra*, at 2. Scientology's response to this June 30, 1978 offer by the court was a document filed on July 31, 1978 entitled, "Petitioner's Reply to Government's Proffer of Testimony and Exhibits and Memorandum of Law in Response to Informal Court Order of June 30, 1978." Record, Vol. III, #67, July 31, 1978. In this document under the subheading "Individual Documents Were Improperly Seized," Scientology referred to its previous contention that items 1-148 were not mentioned in the Tittle (Supporting) affidavit, and that items 149-161 were not supported by probable cause in the Tittle affidavit. The substance of this contention is nothing more than the same broad attack that a general search and seizure of the opportunity offered by the court as presenting Scientology with what would be nothing more than a "futile exercise." Separate Statement, n.3. Therefore, it is submitted that the individual documents claim was abandoned below, or was waived on appeal, and has thus been allowed to expire. It is not for this court to revive it. I therefore dissent from the remand on this point.

In my judgment the Separate Statement, *infra*, fails to recognize the full authority to seize documents under item 162 and the incorporated supporting affidavit. It

incorrectly assumes that more seized documents depended upon a "plain view" rationale for the validity of their seizure than is actually the case. Some of the agents may have similarly been uninformed as to their full authority under the search warrant. What the Separate Statement does not consider is that many of the documents could be seized as

> "fruits, instrumentalities, and evidence (at this time unknown) of the crimes of conspiracy, obstruction of justice and theft of government porperty [sic] in violation of 18 U.S. Code §§ 371, 1503 and 641 *which facts recited in the accompanying affidavit make out.*"

JA 39, 40-72. (Emphasis added). Thus, as to documents that were instrumentalities of the crimes, like documents reporting on the progress of the alleged illegal ventures, or fruits of the alleged crimes, and stolen government documents, or copies thereof, their seizure was directed by the search warrant and reliance on "plain view" authority was not necessary, though it would be easy in many such instances to rely on "plain view" because the incriminating incidences were so apparent in the document. For example, see our discussion of "Red Box" matter in *United States v. Heldt*, —— F.2d —— (D.C. Cir. 1981), filed contemporaneously herewith.

CONCLUSION

For reasons set forth above we hold that the decision of the district court, holding that the search resulted in an unconstitutional general seizure and ordering the suppression of all seized documents except stolen ones, is not supported by substantial evidence in the record and is clearly erroneous. We therefore vacate that part of the applicable order and judgment as there is no showing that the seizure of the documents the Government had decided to retain was illegal in any respect.

We affirm the court's dismissal of the Church's remaining challenges to the search. Inasmuch as this should terminate the case, it will be in order, after the times for rehearing and certiorari have expired, for the Government to return the seized documents it indicated originally it intended to return.[21]

Judgment accordingly.

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[21] It should be noted that appellant Scientology, its indicted officials and members, have already received substantial benefit from their attack on the search in that Scientology was not indicted and none of the documents seized in the Washington search were used against their officers and members in the criminal trial on their indictment for the various offenses growing out of their burglaries of government offices, the theft of numerous government documents and the attendant conspiracies.

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Separate Opinion of *Circuit Judge* WALD, in which *Chief Judge* ROBINSON concurs:

I concur in Judge MacKinnon's opinion, with the exception of Part III, B (entitled "The Bases of the District Court's Decision"), Part X, and the Conclusion.[1] I agree that the record does not support the district court's decision that the agents conducted a general search or seizure. *See* Judge MacKinnon's Op. at 1. I am also convinced, however, that the Church of Scientology ("Church") must be provided with at least one adequate opportunity to indicate to the district court whether any *particular* documents must be returned because they fall outside the scope of the warrant and were not properly seized under the plain view exception to the warrant requirement. Since all the members of this panel agree that the Church "is entitled to the return of items seized outside the warrant," Judge MacKinnon's Op. at 1,[2] and since the district court has never made any finding regarding which particular documents were improperly seized, I find that this case must be remanded to allow the district court to perform that task.[3]

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[1] I must also decline to concur in the majority's footnote 15, because I believe it unnecessary to the opinion, and perhaps incorrect.

[2] *See also* Judge MacKinnon's Op. at 25-26, 32-33.

[3] I cannot agree with Judge MacKinnon's opinion, Part X, that the Church waived its objections to the illegality of the seizure of particular documents below. It clearly announced its intention to present evidence on particular documents that were allegedly illegally seized as outside the scope of the warrant, *in the event that more generalized attacks upon the execution of the warrant failed. See* Joint Appendix ("J.A.") at 163, 360, 366. In the two day hearing on April 21 and 28, 1978, however, the trial judge stated most emphatically and repeatedly that he wished to hear only evidence pertaining to the reasons why documents slated to be *returned*

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In Part III, B, Judge MacKinnon's opinion discusses why the district court improperly relied upon the government's offer to return "innocuous" documents as the

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to appellees were seized, not any evidence pertaining to particular documents the government intended to keep or use. *See* J.A. 360, 566, 683-89, 692, 841-42; Government's Brief at 6-7. Judge MacKinnon's Op. at 6. After this "truncated" hearing to which the government vigorously objected as inadequate to air the issues in the case (Government's Brief at 6-7), the court requested any and all additional pleadings to be submitted in writing and ruled subsequently that all material seized (except stolen items) be returned because a "general exploratory seizure" had taken place in violation of the fourth amendment. J.A. 19.

Under these circumstances I do not think that the Church was required to raise individually every document whose seizure it objected to as outside the warrant in post-hearing written submissions at the risk of waiving all such objections. Having been denied any right to present oral testimony or cross-examine witnesses at a hearing as to the circumstances in which each such document was seized, it would most likely have been a futile exercise. Moreover, the Church did indicate a desire and intention to question FBI witnesses on the retained documents. *See* Status Memorandum of the Founding Church of Scientology, May 5, 1978, Record, vol. 2, no. 43 at 2-3; Petitioner's Reply to Government's Proffer of Testimony and Exhibits and Memorandum of Law in Response to Informal Court Order of June 30, 1978, July 31, 1978, Record, vol. 3, no. 67. Indeed it appears that the government itself assumed on appeal that such objections might still be taken to individual documents on remand, once its appeal as to the overall reasonableness of the seizure is won. Government's Brief at 36. ("[O]ur position . . . has been that the District Court's task is to determine what individual documents, if any, were seized without authority and to direct their return. We have screened out those documents we are prepared to return voluntarily (without conceding their illegal seizure) in order to simplify the court's task.") *But cf.* J.A. 185 (government claim below Church had "abandoned" objections to individual documents). Although the trial court in its memorandum opinion finding that a general seizure had taken

basis for finding a general search. I agree with Judge MacKinnon that an inordinately heavy reliance was placed upon the government's proffer of return. First, it is apparent that the United States Attorney's Office had not had an adequate opportunity to examine the documents and classify them carefully before making its offer. *See* J.A. at 341, 351-53. More importantly, even if the United States Attorney's classification of "innocuous" documents had been a careful and considered one, such classification simply is not probative of whether each of those documents was lawfully seized. There are a variety of reasons for the government to return documents voluntarily, *e.g.*, they may be superfluous, or unhelpful, or simply duplicative of the many thousands of documents seized in the California search, which were based essentially upon the same warrant. *See generally* Government's Brief at 48-49. The high percentage of documents voluntarily offered for return [4] is therefore not an appropriate basis upon which to find a search unconstitutionally general. Furthermore, treating the government's offer to return seized property as evidence of wrongdoing might have an undesirable effect: "such activity, which should be encouraged, would be chilled: the government will not return property out of fear that it will be interpreted as an admission of impropriety." *United States* v. *Hubbard*, 493 F. Supp. 209, 234 (D.D.C. 1979).

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place also ruled against petitioner "on all other grounds," we do not read that as a blanket dismissal of claims concerning individual documents about which it had refused to hear any evidence or argument during the hearing. Indeed, such a reading would seem inconsistent with its primary ruling that all the material—not just individual documents—had been illegally seized.

[4] *See generally* J.A. at 128-39 (Church's computer analysis of seized documents estimates that 79% of such documents are to be returned voluntarily).

4

Part III, B of Judge MacKinnon's opinion also discusses a second basis for the district court's holding of a general search, *viz.*, the testimony of the participating agents. *See* Judge MacKinnon's Op. at 13-19. The district court excerpted remarks by FBI Agents Higgins, Dean and Booth, all related to their conduct and opinions regarding the search. J.A. 12-13. I find these remarks wholly inadequate as a basis for determining that a general seizure occurred. My own review of the testimony before the district court, *see generally* J.A. at 363-896 (testimony of the agents), persuades me that the methods and procedures used were not deliberately overbroad in scope, and were not designed to net documents outside the scope of the warrants. Furthermore, of the 93 file drawers, 14 desks, 3 bookshelves, and numerous boxes and files of loose documents in the suite, the agents seized materials filling altogether only two cardboard boxes measuring 18 inches by 12 inches by 12 inches.[5] The record and the testimony simply do not show a general rummaging by the agents amounting to an unconstitutionally general search which might require the return of all documents.

The final basis for the district court's disposition was its "survey of the inventory of items seized," which convinced the court that "nearly half or more of the seizure" fell outside the scope of the warrant. J.A. 14. On this point I also agree with Judge MacKinnon's analysis, which concludes that "a survey of this type is inherently unreliable."[6] In sum, I am convinced that the district court's decision in this case must be reversed.

Granting that the search was not so broad as to require the wholesale return of everything seized, I do not

[5] *See* J.A. at 204; Government's Brief at 11-12; Church's Reply Br. at 28.

[6] *See* Judge MacKinnon's Op. at 25.

believe that the Church should be precluded from showing that some particular documents may have been taken unlawfully and therefore should be returned. I cannot accept Judge MacKinnon's document-by-document analysis which attempts to ascertain whether any particular documents were unlawfully seized. It is not the function of this appellate court to engage, *de novo*, in a highly factual determination concerning which particular documents were within or without the warrant. The district court has not yet even attempted to perform this task; this matter is therefore not yet appropriate for our review. Furthermore, none of the issues relating to *particular* documents have been briefed or argued orally before this court. The proper approach is a remand to permit the trial court to make this determination. *See generally In Re Search Warrant*, 572 F.2d 321, 327 (D.C. Cir. 1977) (holding that the district court may "consider and determine whether any specific document may have been seized outside the authority of the search warrant").

Upon remand, the district court must first ascertain which documents are actually in dispute. The court need not undertake an examination of every single document seized. Instead the parties may be required to come up with a list of documents, not yet returned, about which some dispute exists. Assuming there are such documents, the court should then examine each of them with an eye toward answering two questions: (1) was the document lawfully seized pursuant to the list of particulars contained in the warrant; if not, (2) was the document lawfully seized under the plain view exception to the warrant requirement. If the answer to both questions is no, the document must be returned; otherwise, the government is entitled to retain it. Since the district court, in all likelihood, will have to apply the plain view

exception,[7] the following guidance may be helpful in avoiding future unnecessary appeals.

Judge MacKinnon's discussion of the plain view doctrine [8] is insufficiently sensitive to the limitations which govern the seizure of documents nowhere mentioned in the wararnt, but seized nonetheless. In *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971), a plurality of the Supreme Court found that under certain circumstances police may seize objects in "plain view" when they are searching pursuant to a warrant, even though the warrant does not specify those objects. The Justices recognized, of course, that an expansive interpretation of the plain view exception might swallow the rule of particularization, since

> *any* evidence seized by the police will be in plain view, at least at the moment of seizure. The problem with the "plain view" doctrine has been to identify the circumstances in which plain view has legal significance rather than being simply the normal concommitance of any search, legal or illegal.

Coolidge v. *New Hampshire*, 403 U.S. at 465 (original emphasis in original).

Unless these circumstances are identified and applied, any warrant authorizing a search for a particular document might, in conjunction with the plain view exception, permit "government officials to use a seemingly precise and legal warrant only as a ticket to get into a man's home and, once inside, to launch forth upon confined searches and indiscriminate seizures as if armed

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[7] The government acknowledges in its brief that the agents, who believed they were seizing documents at least in part under the plain view doctrine, must obey the doctrine's limitation set out in Coolidge v. New Hampshire, 403 U.S. 443 (1971). *See* Government's Brief at 37 n.30; *see also* J.A. at 13 (testimony of agents before the district court); text immediately *infra*.

[8] *See* Judge MacKinnon's Op. at 17-18.

with all the unbridled and illegal power of a general warrant." *Stanley* v. *Georgia*, 394 U.S. 567, 572 (1969) (Stewart, J., concurring). Clearly, the plain view exception must be defined in such a way as to preclude using a document search warrant as authority to search for and seize all evidence of wrongdoing in the form of documents which happen to be located at the search site. *Cf. In Re Search Warrant*, *supra*, 572 F.2d at 324.

Based upon *Coolidge*, courts have formulated three limitations upon the plain view exception. First, the searching agents must lawfully be in the location where their plain viewing occurs, *i.e.*, seizures based upon plain view can occur only within the geographical limitations set out, or implied, in the warrant. *See, e.g., Keiningham* v. *United States*, 287 F.2d 126, 129 (D.C. Cir. 1960); *United States* v. *Principe*, 499 F.2d 1135, 1137 (1st Cir. 1974); 2 W. LaFave, *Search and Seizure* § 4.10 (1978). Second, any seized item unspecified in the warrant must possess an incriminating character plainly and immediately apparent on its face, a character sufficiently incriminating to establish probable cause for its seizure despite the absence of a warrant mentioning it. Third, the searching agent must come upon the unspecified items inadvertently. There being no question about the agents' obedience to the geographic limitations of the warrant, we now discuss briefly the latter two limitations on plain view.

The incriminating character limitation necessarily permits a brief perusal of documents in plain view in order to determine whether probable cause exists for their seizure under the warrant. *See generally United States* v. *Ochs*, 595 F.2d 1247, 1257 n.8 (2d Cir.), *cert. denied*, 444 U.S. 955 (1979) (cases cited). If in the course of that perusal their otherwise incriminating character be-

comes obvious, they may be seized. *Id. See also Mapp* v. *Warden*, 531 F.2d 1167, 1172 (2d Cir.), *cert. denied*, 429 U.S. 982 (1976) ("it would be absurd to require an investigator to be oblivious to that which would be apparent to anyone else with normal powers of observation"). Otherwise, the perusal must cease at the point that the warrant's inapplicability to each document is clear. Searching officers may not cart away documents unspecified by the warrant which simply look somewhat suspicious, comb through them at their leisure and then return them if after careful inspection they do not constitute evidence of criminal activity. That sort of abuse might return us to the days of the general warrant and must be scrupulously avoided.

The other, closely related limitation on the admission of unspecified documents seized under a search warrant is that of inadvertence. *See Coolidge* v. *New Hampshire*, *supra*, 403 U.S. at 469-70. This requirement has been unevenly applied by courts. *Compare, e.g., United States* v. *Davis*, 542 F.2d 743, 745 (8th Cir.), *cert. denied*, 429 U.S. 1004 (1976), and *United States* v. *Wysong*, 528 F.2d 345 (9th Cir. 1976) (courts characterizing as "inadvertent" the discovery of items as to which it appears police could have made showing of probable cause to seize, but failed to do so), *with United States* v. *Winston*, 373 F. Supp. 1005, 1007 (E.D. Mich. 1974) (seizure of item cannot be "inadvertent" if, before searching begins, police have probable cause to seize it). I believe the inadvertence limitation stands for the simple proposition that agents must not be searching for items outside the particulars of the warrant when they conduct the search; in other words, agents must act in good faith to confine themselves to searching for the specified items. *See generally United States* v. *Rettig*, 589 F.2d 418, 423 (9th Cir. 1978). Because the present record discloses no substantial evidence of bad faith in the agents' conduct with

regard to inadvertence, the district court's attention may focus upon compliance with the incriminating character limitation.

For the reasons set forth above, Chief Judge Robinson and I find that the district court's holding that the search resulted in an unconstitutional general seizure is unsupported by the record and clearly erroneous. We therefore vacate the district court's order and remand the matter to it to permit a determination as to which particular documents, if any, were seized outside the warrant and must therefore be returned. We affirm the district court's dismissal of the Church's remaining challenges to the search.

APPENDIX B

ORDER

United States Court of Appeals for the District of Columbia Circuit

November 10, 1981

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1981

No. 79-2138

[Filed: November 10, 1981]

In Re: Search Warrant Dated July 4, 1977, for Premises at 2125 S Street Northwest, Washington, D.C.	Miscellaneous Action No. 77-0151
United States, *Appellants*	Argued 12-9-80

And
Consolidated Case No. 79-2176

BEFORE: Robinson, Chief Judge, Wright, Tamm, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards and Ginsburg, Circuit Judges.

ORDER

The suggestion for rehearing *en banc* filed by the Church of Scientology has been circulated to the full Court and no member of the Court has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid suggestion is denied.

Per Curiam

FOR THE COURT:

George A. Fisher,
Clerk

By: /s/ Robert A. Bonner
Chief Deputy Clerk

Circuit Judge Tamm did not participate in the foregoing order.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1981

No. 79-2138

[Filed: November 10, 1981]

In Re: Search Warrant Dated July 4, 1977, for Premises at 2125 S Street, Northwest Washington, D.C.

Miscellaneous Action No. 77-0151

Argued: 12-9-80

United States, *Appellants*

And Consolidated Case
No. 79-2176

BEFORE: Robinson, Chief Judge, MacKinnon and Wald, Circuit Judges.

ORDER

On consideration of the petition for rehearing filed by the Church of Scientology, it is

ORDERED by the Court that the aforesaid petition is denied.

Per Curiam

For the Court:

George A. Fisher
Clerk

By: /s/ Robert F. Bonner
Chief Deputy Clerk

APPENDIX C

MEMORANDUM AND ORDER

United States District Court for the District of Columbia Circuit

August 24, 1979

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Miscellaneous No. 77-0151

[Filed: August 24, 1979]

In Re: Search Warrant Dated July 4, 1977 for Premises Located at 2125 S Street, Northwest, Washington, D.C.

MEMORANDUM AND ORDER

On July 8, 1977 agents of the Federal Bureau of Investigation conducted a search of the Washington offices of the Founding Church of Scientology pursuant to a warrant which instructed them to search for numerous documents and evidence of conspiracy, obstruction of justice and theft of government property in violation of 18 U.S.C. §§ 371, 1503 and 641. The Church sought return of the property and a protective order against the government's use of the documents seized. The United States Court of Appeals for the District of Columbia reversed this court's ruling of July 27, 1977, that the warrant in this case was a general warrant in violation of the Fourth Amendment.

The Court remanded this action to this court to decide several issues which remained open:

> that the search was conducted in a manner that constituted a violation of the Fourth Amendment, that the agents employed unnecessary force in violation of 18 U.S.C. 3109; and the warrant was stale. [*In Re: Search Warrant Dated July 4, 1977*, 572 F.2d 321, 328 (D.C. Cir. 1977).]

At the hearing on these remaining contentions, some of the agents who participated in the search for and seizure of the documents gave vivid accounts of (1) the authority under which they seized documents they took from the Church offices; and (2) the manner in which they conducted their seizure, i.e., whether the documents were taken deliberately or by accident.

At about 8:45 a.m., twenty-five F.B.I. agents appeared at the Church premises. Entry was forced to rooms on the fourth floor which contained the Church filed, and about fifteen of the agents sifted through documents until 7:00 p.m., a total of ten hours.

The warrant listed as items to be seized 148 specific documents and files allegedly stolen from government offices, a summary of certain grand jury testimony and twelve other documents and categories of documents believed to be evidence of alleged conspiracies. In addition, item number 162 authorized seizure of "any and all fruits, instrumentalities and evidence (at this time unknown) of the crimes of conspiracy, obstruction of justice and theft of government porperty [sic] in violation of 18 U.S. Code §§ 371, 1503 and 641 which facts recited in the accompanying affidavit make out."

Three agents who testified about their seizure of documents said they took documents under one of the more specific headings of the warrant (items 1 through

161); under the less specific item 162 which authorized the agents to seize "[a]ny and all fruits, instrumentalities and evidence (at this time unknown) of the crimes of conspiracy, obstruction of justice, and theft of government porperty [sic] in violation of 18 U.S. Code 371, 1503 and 641 which facts recited in the accompanying affidavit make out"; or under the "plain view" doctrine. They also gave several explanations of how they decided to seize documents which did not fit within one of the specific categories listed on the warrant. For example, Agent J. F. Higgins said:

> [F]or instance, we were told to try to get guardian orders—relating to guardian order 1634—well, if I saw a compliance report to that guardian order, to my understanding of the crimes alleged, that seemed to establish a relationship to the item described in the generalized kind of description of an item that would be pertinent— [Tr. 216.]

At another point Higgins explained:

> Well Your Honor, the items that I was having a little bit of question with were the items that were labelled Snow White or something of that nature. Then I would look into the—I would read the document over, and if it was something of that nature and there was a word in there that more or less, or a couple of words, or a phrase or a paragraph in there that indicated that that particular Snow White document pertained to what would be characterized as overt [sic] activity, I would take it. [Tr. 220.]

Higgins explained more fully later on:

> [W]hen I saw items that related to Snow White, I was working under the presumption that we were seeking evidence of criminal conduct, when Snow White is described in that affidavit as main program

> directed against governmental agencies – which means the main things that were not quite on the up and up . . . Because as I went over each document I read, understanding the violations that were being alleged, and I sought to see whether or not Snow White – that particular document that had Snow White on it – meant or related to activities which would have appeared to be criminal. [Tr. 224-225.]

Agent Joel Dean explained why he seized a pleading filed in a legal suit brought by Gregory Taylor. (He testified that he took the document under Item 162 of the warrant.)

> The reason I chose this particular item to take during the search was that Gregory Taylor was present upon entering the Fourth Floor rear of the Scientology. He was an individual who had access to that location. He was an individual, who I think – as I remember, I guess it was IRS had arrested him, mistaking that he was a Mr. Wolff.
>
> This, indeed, showed that the Church of Scientology had an interest in him. . . . The fact that he was on the premises in the area that secured papers were located, and that the church had an interest in him as an individual, it was my estimation that he could certainly have been a participant in the church's plan to obstruct justice in regard to the theft of Government property. [Tr. 279.]

Dean also testified that a number of documents were seized under the plain view doctrine.

> Computer Number 50287. This is a document pertaining to codes. I seized it under the plain-view doctrine. . . . It's a listing of codes – codes for different terms, names, and words. . . . I'm telling you that the reason this was seized is because it

would be a valuable key into the entire 161 items to undertstand them in their entirety.

THE COURT: So you chose that item, not on the basis of anything in the list, but on the basis—Well, you fancied it to be important?

THE WITNESS: It's a listing of codes, and knowing the other 161 items could have codes, and after reading this, I selected this and seized this so we could interpret the other items that were seized in regard to the affidavit. [Tr. 323-325.]

Dean said that he had seized 14 of the inventoried documents as a package of codes under the plain view doctrine. Tr. 339.

Agent Charles Booth testified about his seizure of a document which was labeled with a large "SW" on the top and which he took according to items 152, 155 and 156 of the warrant.

It has got "SW" on the top of it, I think. . . . That to me meant "Snow White" . . . and which was listed in the search warrant, it says, "Utilize BI for help in leads for discovery." "BI" meant to me, the Bureau of Information . . . of the Church of Scientology. Which I construed to mean that the Scientologists were attempting to put a source within the FBI to obtain any information that they couldn't get or did not get under the Freedom of Information. . . . But it would fall under the category of the operation that the Scientologists have utilized, I believe. I believe it is Guardian Order 1361. [Tr. 504-505.]

A survey of the inventory of items seized by the F.B.I. agents reveals that these selection procedures led to the seizure of several hundred documents—nearly half or more of the seizure—which were not designated by the warrant; and by no stretch of the imagination could

they be regarded as within the designated categories of documents to be seized. In effect the agents conducted a general seizure. The determination as to what items were relevant to the warrant was subsequently made by the prosecutors at a more leisurely pace after the seized documents had been transferred to their office.

The government has decided to return the "innocuous" items voluntarily. One of its representatives claims, however, that these items are merely cumulative, and that their return says nothing about whether the documents are in fact evidence of crime. I find this explanation patently incredible and unworthy of belief. This, especially in light of the fact that other members of the United States Attorney's office have represented to the court that fully half of the documents which were seized were innocuous, meaning they held no criminal connotation.[1]

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[1]Assistant United States Attorney Brian Shaughnessy told this court on July 27, 1977:

> Your Honor, copies have been made of, I would say about 75 per cent of the two boxes of documents. That represents the fifty per cent approximately—I don't know the exact percentage, but whatever percentage it was that was going to be retained, and those documents that were on closer examination found not to be relevant to the anticipated criminal proceedings were to be returned. [Tr. 7.]

Assistant United States Attorney Garey Stark stated in open court on August 12, 1977:

> I do recall, however, during that period of time when I was fairly intimately involved in the developments of this investigation that a perusal, which took place as quickly as possible after the seizure of such seized documents was made by members of our office and the Federal Bureau of Investigation, and it was the judgment of the people making that perusal that—I may be incorrect, but I think approximately 40 or 50 per cent of the items seized would fall into a category, which in the opinion of the prosecutors would not be used in any criminal investigation.

[footnote continued]

But in any event the contention is made that the recognized adequate remedy for such an illegal seizure is the voluntary return of the items deemed worthless to the prosecution's cause. Cited as authority for this proposition is *United States v. Forsythe*, 560 F.2d 1127 (3d Cir. 1977), which in turn directs attention to Justice Blackmun's observations set out in footnote 11 of the Court's opinion in *Andresen v. Maryland*, 427 U.S. 463, 482 (1976), as support for this view. However, I do not believe that the Court in *Andresen* intended to condone as a practice (a) the wholesale seizure and carting away of documents by officers who willfully exceed the scope of their authority under a warrant, and thus violate the law;[2] (b) a more leisurely screening and selection of those which are relevant by prosecutors in their offices; and then (c) the voluntary return of unwanted items. If this were so, then the manifested concern that private papers be accorded the fullest possible Fourth Amendment protection is meaningless. I think it significant in this regard that Justice Blackmun recognized the fact that: "In searches for papers, it is certain that some innocuous documents will be *examined*, at least cursorily, in order to determine whether they are, in fact, among those papers authorized to be *seized*." *Andresen v. Maryland*, 427 U.S. 463, 482 n.11 (emphasis added).

THE COURT: That is what they call innocuous documents?

MR. STARK: Innocuous or whatever adjectives are appropriate. I don't know. I see no reason why documents which fall into that category cannot be returned. [Tr. 3.]

[2] 18 U.S.C. § 2234 provides:

Whoever, in executing a search warrant, willfully exceeds his authority or exercises it with unnecessary severity, shall be fined not more than $1,000 or imprisoned for not more than one year.

This obviously does not imply acceptance of the proposition that it is certain that such innocuous documents will be seized and carried away after examination, cursory or otherwise, reveals that they are clearly not contemplated under the warrant.

As I read the same footnote in *Andresen*, the lower federal courts are admonished to be particularly sensitive to guarding against unwarranted encroachments on the constitutionally protected right of privacy involved in a document search. And it suggests a rational line of approach to the problem when it analogizes a document search to a wiretap, and cautioned that they should be conducted in a manner that *minimizes* unwarranted intrusions.

In 1968 when Congress authorized the surreptitious interception of wire communications it at the same time recognized the deep intrusiveness of wiretapping and electronic surveillance upon individuals' personal privacy. This concern is reflected in the enactment of 18 U.S.C. § 2518(5) (1970) which provides that any seizure of conversations "be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter."

It appears that the Fourth Amendment's requirement that warrants "particularly describe the place to be searched, and the persons or things to be seized" can fairly be equated to the wiretap statute's "minimization requirement." Central to the purpose of both is the protection of individual privacy from unreasonable infringement on the part of government. The only patent difference between the two provisions is that one (the Fourth Amendment requirement) is much more easily managed than the other. Compliance with the Amendment is a relatively simple task, requiring nothing more

than curbing one's curiosity and adhering to the directions contained in the warrant.

The type of seizure here involved should be forcefully discouraged rather than condoned, and presents a prime target for the exclusionary rule. The Supreme Court stated the objectives of this sanction in succinct terms in *Stone v. Powell*, 428 U.S. 465, 486 (1976):

> The primary justification for the exclusionary rule then is the deterrence of police conduct that violates Fourth Amendment rights. Post-*Mapp* decisions have established that the rule is not a personal constitutional right. It is not calculated to redress the injury to the privacy of the victim of the search or seizure, for any "[r]eparation comes too late." *Linkletter v. Walker*, 381 U.S. 618, 637 (1965). Instead,
>
> > "the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect . . . ." *United States v. Calandra, supra*, at 348.

Obviously the mere voluntary return of items deemed worthless by the prosecutor in no way serves the purpose of the exclusionary rule, and constitutes no sanction whatsoever. And if accepted as an adequate remedy in lieu of the suppression and return of the entire seizure, rather than having the effect of deterrence, it would instead constitute a breeding ground for more and more widespread abuse.

I do not believe there is any widespread tendency on the part of higher courts to accept such an empty jesture as adequate remedy for deliberate and unnecessary invasions of privacy in cases involving papers or wire communications, although one circuit has in fact taken that view, *United States v. Cox*, 462 F.2d 1293 (8th Cir.

1972), in a case involving the minimization clause of the wiretap statute. It is interesting to note, however, that the trial court in *Sisca v. United States,* 361 F. Supp. 735 (S.D.N.Y. 1973), rejected defendant's contention that incriminating communications should be suppressed on account of the failure to minimize. The motion was denied on two grounds. The court pointed out that it was denied as not timely filed under the terms of the statute; but then went on to decide that regardless of its untimeliness, the motion should be denied because suppression of the entire wiretap is not warranted by violation of the minimization requirement. However, in affirming on appeal the Second Circuit Court of Appeals specifically pointed out that its affirmance was based on the timeliness issue and not on the question of the appropriate remedy. 503 F.2d 1337. Our own circuit, though hinting what its views might be, specifically avoided resolution of the issue. *Scott v. United States,* 436 U.S. 128, 135 n.10 (1978).

I think it should be pointed out that it is one thing to neglect taking the appropriate action to avoid the feared deep intrusion into one's privacy such as occurs in a wiretap with no effort to minimize. It is quite another, and much more egregious matter, when government agents engage in vigorous overt action which is specifically designed to subvert the protections which the Amendment seeks to afford, and which at the same time violates a specific statute enacted for the purpose of buttressing the specificity requirement of the Fourth Amendment.

I wish to emphasize that the quantity of innocuous documents seized, though significant in assessing the depth of the unlawful intrusion, is not the determining factor in my concluding that the seizure is unreasonable.

Rather, it is the stark fact that they were seized, in spite of the fact that they obviously were not included in any of the categories of items to be seized as contained in the warrant, and thus in flagrant violation of the statute (18 U.S.C. § 2234) which is designed to bolster the effectiveness of the particularization requirement of the Fourth Amendment.

Accordingly, the court hereby holds that the United States illegally and unconstitutionally executed this warrant and converted their seizure of documents into a general exploratory seizure in violation of the Fourth Amendment and of 18 U.S.C. § 2234.

The court rules against petitioner on all other grounds.

Upon consideration of the above, the court ORDERS that the government, forthwith:

(1) return to petitioner all materials seized on July 8, 1977 in a search of petitioner's S Street premises by agents of the Federal Bureau of Investigation under a July 4, 1977 warrant, except stolen items;

(2) destroy any and all copies of said items in its possession or control; and

(3) retrieve and destroy all copies of any materials so seized, which have been disseminated to any person outside the Fraud Section of the United States Attorney's Office.

And it further ORDERS

That any items seized during the course of this illegal search, be, and it is suppressed as evidence, and shall not be admissible at any hearing or trial.

/s/ William B. Bryant
United States District Judge

August 24, 1979

APPENDIX D

OPINION

United States Court of Appeals for the District of Columbia Circuit

December 1, 1977

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-1793 September Term, 1977

In Re: Miscellaneous #77-0151

Search Warrant Dated July 4, 1977,
for Premises at 2125 S Street,
Northwest, Washington, D.C.

BEFORE: MacKinnon and Robb, Circuit Judges; Markey, Chief Judge, US Court of Customs and Patent Appeals*

JUDGMENT

This cause came to be heard on the record on appeal from the order of the United States District Court for the District of Columbia and was argued by counsel. On consideration of the foregoing, for reasons which appear in the attached *per curiam* opinion, it appears to the Court that the warrant for the search of the premises at 2125 S Street, Northwest, Washington, D.C. dated July 4, 1977 is indistinguishable in practical effect from the warrant upheld by the Supreme Court in *Andresen v. Maryland,* 427 U.S. 463 (1976); that the warrant states with sufficient particularity the things to be seized; that Item 162 of this warrant does not render the warrant a general warrant within the meaning of the Fourth

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*Sitting by designation pursuant to Title 28 U.S.C. §293(a).

Amendment; and that the warrant does not leave to the executing officers impermissible discretion; it is therefore

ORDERED by this Court that the July 27, 1977 decision of the United States District Court for the District of Columbia that the warrant in this case is a general warrant in contravention of the Fourth Amendment and therefore invalid is reversed; and, it is

FURTHER ORDERED by the Court that the July 27, 1977 order of the District Court is vacated in its entirety; and, it is

FURTHER ORDERED by the Court that the case is remanded to the District Court for consideration of the other grounds alleged for invalidating the warrant not considered by the District Court, specifically, that the search was conducted in a manner that constituted a violation of the Fourth Amendment, that the agents employed unnecessary force in violation of 18 U.S.C. §3109; and that the warrant was stale.

Per Curiam

For The Court:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: December 1, 1977
Opinion for the Court Per Curiam

[Will be printed at a later date]

[Filed DEC 1 1977]

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

No. 77-1793

IN RE:
SEARCH WARRANT DATED July 4, 1977,
for Premises at 2125 S Street, Northwest
Washington, D.C.

Appeal from the United States District Court
for the District of Columbia
(D.C. Misc. 77-0151)

Argued November 18, 1977

Decided December 1, 1977

Hamilton P. Fox, III, Attorney, Department of Justice with whom *Earl J. Silbert,* United States Attorney, *Carl S. Rauh,* Principal Assistant United States Attorney, *Henry F. Schuelke, III,* Executive Assistant United States Attorney, *John A. Terry, Brian Shaughnessy, Raymond Banoun* and *Judith Hetherton,* Assistant United States Attorneys were on the brief, for appellants.

Philip J. Hirschkop, with whom *John D. Grad* and *Earl Dudley* were on the brief, for appellee.

Before: MacKINNON and ROBB, *Circuit Judges*, and MARKEY,* Chief Judge, United States Court of Customs and Patent Appeals

Opinion for the Court *Per Curiam*

PER CURIAM: Following a search and seizure by the Government of numerous documents pursuant to a search warrant, on motions of the Church of Scientology the trial court granted (1) a protective order against the use by the Government of certain of the documents in certain civil litigation between the parties, and (2) ordered the return of the property seized. The latter order which directed the return of the seized property was construed by the court to involve "[i]n effect . . . a motion to suppress" (Appellant's Appendix, 5) and on that basis the Government has appealed therefrom under 18 U.S.C. §3731.[1] The

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*Sitting by designation pursuant to Title 28 U.S.C. §293(a).

[1] 18 U.S.C. §3731 provides:

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An appeal by the United States shall lie to a court of appeals from a decision or order of a district courts suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, [sic] not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.

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The provisions of this section shall be liberally construed to effectuate its purposes.

statute directs such appeals to be diligently prosecuted and pending grand jury proceedings are being held in abeyance awaiting the decision on this appeal. Accordingly, we have expedited the argument on the appeal and our decision as well.

In our view of the controversy the validity of the order of the District Court directing the return of the seized property turns on a single issue, *i.e.*, whether the trial court was correct when it construed the search warrant to be a "general warrant" prohibited by the Constitution.

The principal issue in this case thus turns on whether the warrant is overbroad and constitutes a general warrant because of the reference to the crime of "conspiracy" as set forth in item 162 of the affidavit for the search warrant (App. 32-76), and in the search warrant (App. 22-31). The search warrant in designating the "concealed certain property" that the "Federal Bureau of Investigation" was "commanded to search . . . and seize" stated "(See attached Description of property)." The attachment entitled "*Description of Property*" consisted of 7-½ typewritten pages (App. 33-40) which very specifically described and designated a great many items to be seized if found on the designated premises. There were 162 separately enumerated items so described. In most instances each item referred to a document on a single subject specified by type, date, subject and other relevant data such as the author or addressee. A few items were stated more broadly, but generally none of the first 161 items, except item 155, is attacked for any alleged lack of specificity or particularity. The "Description" incorporated the extensive affidavit attached to the affidavit for the Search Warrant. It is item 162 that is the

principal subject of attack by the appellee and which furnished the principal basis for the ruling by the trial court. As set forth in the Search Warrant item 162 appears in the following context:

> . . . there is now being concealed certain property, namely
>
> (See attached Description of Property)

(App. 22).

DESCRIPTION OF PROPERTY

* * *

> 162. Any and all fruits, instrumentalities, and evidence (at this time unknown) of the crimes of conspiracy, obstruction of justice and theft of government porperty [*sic*] in violation of 18 U.S. Code §§371, 1503 and 641 *which facts recited in the accompanying affidavit make out.*

(App. 31, emphasis added).

The reference in the search warrant to the "accompanying affidavit" incorporated the 33-page "Affidavit in Support of Search Warrant" (App. 42-74) that was attached to the "Description of Property" (App. 33-41), all of which was appended to the regular "Affidavit for Search Warrant," Form A.O. 106 (Rev. Apr. 1973) (App. 12). The affidavit was executed by Robert Tittle, Special Agent, Federal Bureau of Investigation.

The trial court in its Memorandum construed item 162 and stated:

> I hold that the grant of authority [by 162] to the agents to search for and seize any evidence of conspiracies to steal government property and to obstruct justice amounted to a "general warrant" and therefore contravened the Fourth Amend-

> ment's guarantee against unreasonable searches and seizures. I am not persuaded that the Supreme Court's recent decision in *Andresen v. Maryland*, 427 U.S. 463 (1976), is to the contrary.

(App. 6).

In reaching such conclusion we find that the district court gave an overbroad construction to the search warrant, improperly interpreted the relevant offenses, ignored a significant part of item 162 and gave an unduly restrictive interpretation to the Supreme Court decision in *Andresen v. Maryland, supra.*

First, as to the overbroad construction of the search warrant. As stated in its holding, set forth above, the district court held that the search warrant granted "authority to the agents to search for and seize *any* evidence of conspiracies to steal government property and to obstruct justice . . . ." Such construction is patently incorrect. It ignores completely the following language which limits the breadth of item 162: "*. . . which facts recited in the accompanying affidavit make out.*" (App. 31, emphasis added). The recited facts and designations of property and offenses impose particular limits upon the search warrant and that was the purpose of the italicized statement. This, the trial court did not consider. Properly construed the warrant only authorizes a search and seizure of evidence of the particular conspiracies to steal government property and to obstruct justice that are described in the "accompanying affidavit."

Without exhaustively describing these conspiracies and offenses, and the relevant "fruits, instrumentalities and evidence" (App. 31, 40) thereof that are described and particularized in the "Description of Property" and the "accompanying affidavit," the conspiratorial and ob-

struction offenses that may be the subject of the authorized search and seizure, because they are designated and particularized in the affidavit and search warrant, are the following: (1) Conspiracy to steal government property from: (a) the office of the United States Attorney in the U.S. Court House, Washington, D.C., and more particularly from the office of "Assistant United States Attorney Nathan Dodell" (App. 41, 52); (b) the office of Staff Attorney Paul Figley, Department of Justice, Washington, D.C. (App. 41, 48, 50); (c) the Internal Revenue Service (identification cards) (App. 42) and possibly other documents; and (d) by unlawfully breaking and entering such offices and the offices of Interpol maintained in the U.S. Treasury Department in Washington, D.C. (App. 49). (2) Conspiracy to obstruct justice: (a) by illegally obtaining from opposing parties in litigation "documents relating to Scientology-instituted Freedom of Information Act suits against, *inter alia*, the Central Intelligence Agency, the Drug Enforcement Administration, [the U.S.] Customs [Service], Interpol and the Defense Communications Agency" (App. 50); (b) by engaging in illegal eavesdropping (App. 46); (c) by perjury and subornation of perjury committed, *inter alia*, by Henning Heldt, Greg Willardson, Duke Snider, Michael James Meisner, Richard Weigand, Gerald Bennett Wolfe (App. 57-61) and others;[2] most of whom occupy managerial positions with the Church of Scientology in Washington, D.C. and Los Angeles, California (App. 75, 76).

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[2]Anyone who aids, abets, counsels, commands, induces, procures or wilfully causes another to commit an offense in violation of any U.S. statute is guilty as a principal of the crime so committed. 18 U.S.C. §2.

The allegations referred to above, in connection with the *conspiracy* offenses, also include allegations of facts which particularize the specific *substantive* offenses of theft of government property (18 U.S.C. §641) and obstruction of justice (18 U.S.C. §1503).

In addition to all the foregoing a separate part of the affidavit for the search warrant, extending over 11 typewritten pages, is devoted to setting forth in particular detail the "*Nature and Location of Document Files Maintained by the Church of Scientology*" (App. 63-73). This part of the supporting affidavit names names, describes documents, gives dates, describes their contents, and indicates where in the organization's offices they might be found. It also describes their size, the titles under which they might be found in the files, the extent of the relevant files, the meaning of certain titles, such as "program files" (App. 64), "operations (files) (App. 64); "government special bank" (App. 64) and that "two file systems [are maintained] consisting of covertly and overtly obtained documents" (App. 64). Of particular importance is the particular reference to the "confidential file of the Deputy Guardian for Information (U.S.) [of the Church of Scientology]" which allegedly contains "reports written by the [U.S.] Central Intelligence Agency in South American (in particular Ecuador and Bolivia) concerning Interpol agents believed to be involved in drug dealings" (App. 65). Some of the documents which were particularized "included some programs directed against government agencies" (App. 65). The files and filing system at the office designated in the search warrant 2125 S Street N.W., Washington, D.C., was also described and particularized (App. 72).

A significant part of the affidavit also particularizes the stolen documents by specifying their source and the subject matter to which they relate:

SOURCE OF DOCUMENTS

Items 1-99 lists documents stolen (and copied), from the office of Assistant United States Attorney Nathan Dodell, United States Attorney's Office for the District of Columbia.

Items 100-148 lists documents stolen (and copied) from the office of Staff Attorney Paul Figley, Department of Justice, Washington, D.C.

Items 100-122 are documents relating to the case of *Church of Scientology of California v. United States Department of Justice,* CV 74-3550-F.

Items 123-127 are documents relating to the case of *Church of Scientology of California v. Kelly,* Civil Action 74-906.

Items 128-130 are documents relating to the case of *Church of Scientology of California v. Postal Service,* Civil Action 75-2004-R.

Items 131-132 are documents relating to the case of *Church of Scientology of California v. State Department,* Civil Action 75-2832 AAH

Items 133-134 are documents relating to the case of *Church of Scientology of California v. Alcohol, Tobacco and Firearms,* Civil Action 75-1699 RFP.

Items 135-136 are documents relating to the case of *Church of Scientology of California v. Department of State,* Civil Action 75-2562E.

Item 137 is a document relating to the case of *Church of Scientology of California v. Department of Transportation,* Civil Action No. 75-3482.

> Items 138-147 are documents relating to the case of *Church of Scientology of California v. Energy Research and Development Administration*, Civil Action No. 76-11R.

(App. 41).

The last paragraph of the affidavit makes further specific reference to "the crimes . . . which facts recited in the accompanying affidavit make out . . . ." (App. 40, 31).

> Based on the foregoing, affiant submits that there is probable cause to believe that, from 1974 through 1976, officials of the Church of Scientology in Los Angeles, California and in Washington, D.C., conspired to steal documents from the Government of the United States by means of the burglary of U.S. Government offices and theft by operatives of the Church in the employ of the U.S. Government; that documents belonging to the United States Government were stolen pursuant to that conspiracy; that copies of such stolen documents are secreted in the files of the Church of Scientology in Los Angeles, California, and Washington, D.C.; that subsequent to the confrontation between Messrs. Meisner and Wolfe and agents of the F.B.I. on June 11, 1976, officials of the Church of Scientology conspired to obstruct justice by preparing a false response to expected inquiries of Meisner and Wolfe by law enforcement authorities and federal grand juries; that plans, scenarios and directives were committed to writing in furtherance of this conspiracy; that such writings are secreted in the files of the Church of Scientology in Los Angeles, California, and Washington, D.C.; that the objects of this latter conspiracy were met in part before a Grand Jury of the United States District Court for the District

> of Columbia on June 10, 1977; that, thereafter a summary of Wolfe's Grand Jury testimony was prepared by him in furtherance of the objectives of this latter conspiracy; and that copies of that summary are secreted in the offices of the Church of Scientology in Los Angeles, California, and Washington, D.C. (Appellant's App. 73.)

It is apparent from the "Memorandum and Order" of the trial court that it interpreted the reference in the search warrant to "conspiracies" to refer to "conspiracies to steal government property and to obstruct justice" (Appellant's App. 6). We agree. However, we strongly disagree with the statement that the affidavit and search warrant were therefore general and not sufficiently particularized to pass constitutional muster. As outlined briefly above, the supporting documents went into great particularity not only as to the relevant documents and their location but also as to the particular offenses that the property sought was designed to prove. These offense are not "amorphous" – they are specific, particularized and according to the affidavit supported by reams of hard documentary evidence as well as by sworn statements of some of the alleged conspiractors and principals in the conspiracy and substantive offenses.

We agree with the District Court that the searches and seizures can only be conducted after a showing of

> . . . probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched and the person or things to be seized.

U.S. Const. amend. IV. However, we agree with the finding of the United States Magistrate that the affidavit did show probable cause and described the "place to be search and the . . . things to be seized"

with the required particularity. The trial court Memorandum admits: "To be sure, the affidavit provided the agents with substantial guidance as to what to look for" (App. 17), but it gets off the track when it concludes: "For there is nothing 'particular' about conspiracy" (App. 15). In the context of *this* search warrant and the conspiracies it refers to this is an erroneous conclusion – the two conspiracies here specified were described in great particularity. *See* text, *supra.* We thus do not agree with the further findings of the trial court that the warrant "[permitted] seizure of anything at all" (App. 17), and "invited the agents to seize any document in the Church's files that struck their fancy" (App. 9).

The trial court also finds the warrant to be overbroad because:

> As a practical matter [it constitutes] . . . a directive to seize "evidence at this time unknown" of conspiracy [which amounts to] . . . a "wild card" permitting seizure of anything at all.

(App. 17). This, however, is an overbroad interpretation of the warrant. The warrant, in item 162, only authorizes

> Any and all fruits, instrumentalities, and evidence (at this time unknown) of the crimes of conspiracy, obstruction and theft of government property . . . *which facts recited in the accompanying affidavit make out.*

(App. 31). Thus, as pointed out in the forepart of this opinion, the italicized language imposes a very great degree of particularity and specificity to all the offenses described and to the evidence, fruits and instrumentalities that may be seized. But the important feature about the questioned language in item 162 is that it

follows identically the language which the Supreme Court in *Andresen v. Maryland, supra* found was not overbroad in the context of the offenses there designated. Precisely, *Andresen* holds that the warrant did not become "fatally general because it followed an exhaustive list of particularly described documents with the phrase 'together with other fruits, instrumentalities and evidence of crimes at this [time] unknown.' " 427 U.S. at 479.

A cursory comparison indicates that the questioned language here is more precise tha[n] that in *Andresen*, in that it is limited by the facts concerning the offenses which are made out by the recitations in the accompanying affidavit. Also, the offenses here described do not suffer in comparison with the offense concerning the crime of false pretenses surrounding "Lot 13T" that was involved in *Andresen*. In that decision the search was upheld for evidence of "intent to defraud and knowledge of [the] falsity" of the allegedly false representations. 427 U.S. at 483. The limitation of the present warrant to the designated crimes "which facts recited in the accompanying affidavit make out" is every bit if not more specific and particularized than the warrant in *Andresen*.

A further question is raised as to item 155. Item 156 should also probably be included. These items provide:

155. A Guardian Order generally identified as "Snow White".

156. Any and all Guardian Orders issued pursuant to the Guardian Order generally identified as "Snow White" which would be identified by the mention of "Snow White".

(App. 39). These may be referred to as the "Snow White" files. In connection therewith, on this appeal, the Church contended at oral argument:

> This warrant, if it's upheld by the court [on its Snow White items] authorized the FBI to seize all of the legal files of the Church of Scientology, all of its litigation files, all of its correspondence to counsel, all of its pleadings, all of its proposed pleadings, all of its records.

In this connection, the warrant should not be construed that broadly. While the warrant may have supported a claim to examine the "Snow White" file, just as a warrant to search a house for a murderer would not authorize seizing the contents of the house, the Government cannot retain "all the legal files of the Church of Scientology" but only those in the "Snow White" category that constitute the particularized "Guardian Orders", possibly including general orders in the "Snow White" phase of the Church's operations, and material in such files that constitute "fruits, instrumentalities and evidence . . . of the [stated] crimes . . . which facts recited in the accompanying affidavit make out." (App. 39-40).[3] If any of the

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[3]We have made a cursory examination of the material seized in Washington, D.C. Without going into any detail concerning such material we note it includes (1) apparently *original* documents from the Internal Revenue Service, (2) copies of Central Intelligence Agency documents marked "Secret", and (3) a file on "Bugging", and another on locksmithing, in addition to a great deal [of] other material.

We do not find any of the cases cited by counsel in his letter of November 16, 1977 to be contrary to the above holding. United States v. Katz, 238 F. Supp. 689, 695 (S.D.N.Y. 1965) ordered the return of an automobile that the government sought to forfeit and retain as evidence. The court found that no

[footnote continued]

documents seized in the search by the agents exceed the bounds of the search warrant they should be returned, but the "fruits, instrumentalities and evidence" that were seized, and that are relevant to the particularized offenses and which are specifically referred to in the affidavit and search warrant, should be delivered to the government forthwith for use in connection with the grand jury proceedings. Our order herein does not restrict the right of the court to consider and determine whether any specific document may have been seized outside the authority of the search warrant as construed in this opinion.

On the authority of *Andresen v. Maryland*, 427 U.S. 463, 478-484 (1976), we hold that the search warrant in this case is not a general warrant and is valid. The

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"evidentiary" reason had been shown for requiring the retention of the auto and that it had not supported its forfeiture claim. The court also denied the motion to suppress evidentiary use of other evidence seized in the search. This supports the conclusion we reach that some seized material may be retained while other material may not be retained. United States v. Bell, 120 F. Supp. 670 (D.D.C. 1954), also involved a forfeiture and was decided on procedural grounds. As for Neen v. United States, 386 F.2d 953, 956 (headnote 5) (10th Cir. 1967), and Goodman v. United States, 369 F.2d 166, 168 (9th Cir. 1966), neither are relevant to our disposition of the case. As for the citation to WRIGHT, FEDERAL PRACTICE AND PROCEDURE, CRIMINAL at 676, the citation is generally irrelevant, but it does point out that when a motion to suppress is granted, normally the "property must be returned" but not where the property is "otherwise subject to lawful detention." This would negate that part of the court's order that directed the return to the Church of stolen government property or material that had been improperly copied from government documents. Certainly such material is "subject to detention" by the Government.

order requiring the return of the property is thus vacated.[4]

Order accordingly.

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[4]The search warrant is clearly limited to a search for evidence relating to the crimes of theft of government property, obstruction of justice and a conspiracy to commit such crimes. There is nothing in the nature of the crime of conspiracy as proscribed by 18 U.S.C. §371 that prevents a magistrate from issuing a search warrant to seize evidence that such crime has been committed. In fact, conspiratorial crimes are conducted with more secrecy than many other crimes and search warrants that seek evidence of conspiracy, and otherwise meet the required standards, may extend to all relevant evidence of that crime. Otherwise, alleged conspirators would occupy a special protection from prosecution that is not available to other accused persons. The same may be said of search warrants seeking relevant evidence of obstruction of justice. Neither of these offenses possess any special immunity that would protect them from being ferreted out by proper search warrants seeking relevant evidence. While these offenses may have certain subjective elements, like the criminal intent in Andresen v. Maryland, *supra*, the evidence that proves such subjective elements may be objective, tangible and constitute clear proof. This appears to be a case where, if the documents described and particularized in the affidavit and search warrant, live up to their description, the crimes of conspiracy to steal government property and to obstruct justice and such substantive offenses, would be practically proved, amorphous intent and all, merely by introducing the documents themselves with testimony as to where they were found.

APPENDIX E

OPINIONS

On Suggestion for Rehearing *En Banc*

United States Court of Appeals for the District of Columbia Circuit

January 4, 1978

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S. App. D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-1793

IN RE: SEARCH WARRANT DATED JULY 4, 1977, for Premises at 2125 S Street, Northwest Washington, D.C.

Supplemental Opinions on Suggestion for Rehearing En Banc

(D.C. Misc. 77-0151)

Filed January 4, 1978

BEFORE BAZELON, *Chief Judge*; WRIGHT, MCGOWAN, TAMM, LEVENTHAL, ROBINSON, MACKINNON, ROBB and WILKEY, *Circuit Judges*

ORDER

The suggestion for rehearing *en banc* filed by appellee Founding Church of Scientology, having been transmitted to the full Court and no Judge having requested a vote with respect thereto, it is

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

ORDERED by the Court *en banc* that appellee's aforesaid suggestion for rehearing *en banc* is denied.

Statement of *Circuit Judge* WRIGHT, in Which *Chief Judge* BAZELON and *Circuit Judge* LEVENTHAL Join, as to Why He Does not Request a Vote on the Suggestion for Rehearing *En Banc*, is attached.

Statement of *Circuit Judge* ROBINSON, with Whom *Circuit Judge* MCGOWAN Concurs, as to Why He Does Not Request a Vote on the Suggestion for Rehearing *En Banc*, is attached.

Statement of *Circuit Judge* WRIGHT, in Which *Chief Judge* BAZELON and *Circuit Judge* LEVENTHAL Join, as to Why He Does not Request a Vote on the Suggestion for Rehearing *En Banc*

WRIGHT, *Circuit Judge*: In its most recent case considering the constitutionality of a search warrant the Supreme Court stated:

> General warrants, of course, are prohibited by the Fourth Amendment. "[T]he problem [posed by the general warrant] is not that of intrusion *per se*, but of a general, exploratory rummaging in a person's belongings. . . . [The Fourth Amendment addresses the problem] by requiring a 'particular description' of the things to be seized." *Coolidge* v. *New Hampshire*, 403 U.S. 443, 467 (1971). This requirement "'makes general searches . . . impossible and prevents the seizure of one thing under a warrant describing another. *As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.*'" *Stanford* v. *Texas*, 379 U.S. 476, 485 (1965), quoting *Marron* v. *United States*, 275 U.S., at 196.

Andresen v. Maryland, 427 U.S. 463, 480 (1976) (emphasis added). The search warrant which the panel of this court upheld in this case directed the seizure of

> [a]ny and all fruits, instrumentalities, and evidence (at this time unknown) of the crimes of conspiracy, obstruction of justice and theft of governmental [property] in violation of 18 U.S.C. §§ 371, 1503 and 641 which facts recited in the accompanying affidavit make out.

Appellant's Appendix at 40.

The panel here predicated its decision upholding the warrant squarely on the Supreme Court's opinion in *Andresen*. Thus the question presented in this case is whether "nothing [was] left to the discretion of the officer executing the warrant." Since it is clear that the parties will ask the Supreme Court to review whatever is decided at this level in this case, in the interest of reducing unnecessary delay in this litigation, I think the case should now be passed on to the Supreme Court.

Statement of *Circuit Judge* ROBINSON, with Whom *Circuit Judge* MCGOWAN Concurs, as to Why He Does Not Request a Vote on the Suggestion for Rehearing *En Banc*

ROBINSON, *Circuit Judge*: The warrant under scrutiny directed seizure of 161 designated items and of

> [a]ny and all fruits, instrumentalities, and evidence (at this time unknown) of the crimes of conspiracy, obstruction of justice and theft of governmental [property] in violation of 18 U.S.C. §§ 371, 1503 and 641 which facts recited in the accompanying affidavit make out.[1]

The District Court, denominating the latter call "a 'wild card' permitting seizure of anything at all,"[2] reasoned

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[1] Appellant's Appendix 40, quoted in *In re Search Warrant Dated July 4, 1977*, No. 77-1793 (D.C. Cir. Dec. 1, 1977), at 4.

[2] *In re Search Warrant Dated July 4, 1977*, 436 F.Supp. 689, 698 (D.D.C. 1977).

that it communicated to executing officers permission to search for and seize anything arguably related to any and all violations of the three enumerated statutes [3] and thus was tantamount to an unconstitutional general warrant.[4] The panel, on the other hand, read the warrant as reasonably instructing officers to search only for evidence of seven specific criminal incidents alleged in the affidavit.[5] Thus construed, the warrant in the panel's view was adequately particularized, as judged by the standards of the Supreme Court's recent decision in *Andresen* v. *Maryland*.[6]

Whether the panel correctly appraised a prudent officer's understanding of the language of this warrant is

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[3] *Id.* at 694, 697. See also *United States* v. *Burch*, 432 F. Supp. 961, 963 (D. Del. 1977). The District Court explained:

> The warrant in this case authorized—if indeed it did not direct—agents of the FBI to examine carefully and completely the contents of every document in the fourth-floor files of the Church and to make ad hoc, on-the-spot decisions as to which of those documents constitute evidence of conspiracy—an amorphous and open-ended crime that, as discussed below, has since its conceptual inception perplexed commentators and courts alike. In my view this warrant—addressed as it is to the crime of conspiracy—invited the agents to seize any documents in the Church's files that struck their fancy.

436 F.Supp. at 694.

[4] The Fourth Amendment provides in part that "no warrant shall issue" unless "particularly describing the place to be searched, and the person or things to be seized."

[5] *In re Search Warrant Dated July 4, 1977, supra* note 1, at 5-6. The panel concluded that the authorization in this warrant is nearly identical to that approved by the Supreme Court in *Andresen* v. *Maryland*, 427 U.S. 463, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976). *In re Search Warrant, supra* note 1, at 11. The District Court, however, felt that in context the challenged language, though similar, likely conveyed a different message. See note 3 *supra*.

[6] See note 5 *supra*.

surely not an issue rising to *en banc* caliber.[7] And though the panel's opinion is not entirely clear, I do not view it as a negation of the time-honored principle that the pivotal question is not whether a court in hindsight *can* find in the warrant a curb on the power to search but rather whether at the time of execution an officer reasonably and likely would take the warrant as authority for unbridled rummaging.[8] Nor is it argued that the magistrate reason-

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[7] See Fed. R. App. P. 35(a).

[8] *Andresen* v. *Maryland*, *supra* note 5, 427 U.S. at 493, 96 S.Ct. at 2754, 49 L.Ed.2d at 650 (Brennan J., dissenting); see *id.* at 480-481, 96 S.Ct. at 2748, 49 L.Ed.2d at 642 (majority opinion), quoting *Coolidge* v. *New Hampshire*, 403 U.S. 443, 467, 91 S.Ct. 2022, 2038, 29 L.Ed.2d 564, 583 (1971) (one of two main objectives of the Fourth Amendment warrant requirement is to assure that "searches deemed necessary should be as limited as possible," and the warrant achieves that goal only by directing executing officers to the particular things to be seized), and quoting also *Stanford* v. *Texas*, 379 U.S. 476, 485, 85 S.Ct. 506, 512, 13 L.Ed.2d 431, 437 (1965), in turn quoting *Marron* v. *United States*, 275 U.S. 192, 196, 48 S.Ct. 74, 76, 72 L.Ed. 231, 237 (1927) ("[t]he requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another"; "[a]s to what is to be taken, nothing is left to the discretion of the officer executing the warrant"). See also *United States* v. *United States District Court (Keith)*, 407 U.S. 297, 316, 92 S.Ct. 2125, 2136, 32 L.Ed.2d 752, 765 (1972), quoting *Leach* v. *Three of King's Messengers*, 19 How.St.Tr. 1001, 1027 (1765) ("'[i]t is not fit," said Mansfield, 'that the receiving or judging of information should be left to the discretion of the officer. The magistrate ought to judge and should give certain directions to the officer.'").

Thus, it is not enough that the parameters the magistrate intends to place on the scope of the search would bring it within constitutional bounds. Nor is it enough that a reviewing court is able to read the warrant as not necessarily

ably could have defined the items subject to seizure with greater particularity and thus have "minimize[d] unwarranted intrusions upon privacy."[*] Therefore, because the panel opinion rests squarely upon its quasi-factual interpretation of the total context of this warrant, I think rehearing *en banc* would be unjustified. The mere inclusion in future warrants of language that in isolation is similar or identical to that under review in this case would not necessarily immunize those warrants from challenges that they authorized overbroad searches.

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chartering an impermissible search. The executing officers themselves must know at the outset how far they are licensed to go in their pursuit of evidence.

[*] *Andresen* v. *Maryland*, *supra* note 5, 427 U.S. at 482 n. 11, 96 S.Ct. at 2749 n.11, 49 L.Ed.2d at 643 n.11.

APPENDIX F

OPINION

United States District Court for the District of Columbia Circuit

July 27, 1977

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Miscellaneous No.: 77-0151

In re: **[Filed July 27, 1977]**
Search Warrant Dated July 4, 1977, for Premises at 2125 S Street, Northwest, Washington, D.C.

MEMORANDUM AND ORDER

On July 8, 1977, agents of the Federal Bureau of Investigation (FBI) executed a search warrant on the premises of the Founding Church of Scientology, Washington, D.C.[1] Issued on the strength of a lengthy affidavit alleging that certain Church officials had conspired "to steal documents from the Government of the United States by means of the burglary of U.S. Government offices and theft by operatives of the Church in the employ of the U.S. Government" and to obstruct justice by "preparing a false response to expected inquiries . . . by

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[1] Another search was conducted the same day at the Church's offices in Los Angeles, California. I am concerned here only with the propriety of the search conducted in the District of Columbia.

law enforcement authorities and federal grand juries,"[2] the warrant directed the agents to file cabinets located in the rear of the fourth floor of the building that houses the Church's Washington offices. There, the affiant stated he had probable cause to believe, the agents would find copies of the stolen documents as well as written plans, scenarios, directives and a summary of grand jury testimony prepared in furtherance of the alleged conspiracies.

The warrant directed the agents to leave no stone unturned. It identifies 148 documents and files allegedly stolen from government offices. It also lists as appropriate for seizure the summary of grand jury testimony and 12 other documents and categories of documents that the government apparently believes constitute evidence of the alleged conspiracies. Finally, item number 162 of the warrant authorizes the agents to seize:

> Any and all fruits, instrumentalities and evidence (at this time unknown) of the crimes of conspiracy, obstruction of justice and theft of government porperty [sic] in violation of 18 U.S. Code §§371, 1503 and 641 which facts recited in the accompanying affidavit make out.

While the FBI agents were conducting the search the Church filed a motion in this Court seeking to restrain them from doing so and to impose a protective order sealing all documents seized, primarily on the ground that the warrant was overbroad on its face in violation of the Fourth Amendment to the United States Constitution. The Church argued in addition that should the contents of some of the seized documents be disclosed to representatives of the numerous federal agencies with which

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[2] Affidavit in Support of Search Warrant at 32. The affidavit discusses these allegations in considerable detail.

it is presently involved in civil litigation, its attorney-client privilege would be violated and its litigation prospects irreparably damaged. This Court denied the motion without reaching the merits of the Church's contentions. On July 11 the Church renewed its request for a protective order; with the consent of the United States Attorneys responsible for the criminal investigation, an order was entered prohibiting disclosure of the seized materials to attorneys for or employees of agencies involved in civil litigation with the Church. The order was to remain in effect for ten days.

The Church has now moved for return of the property seized from its Washington files on July 8. Rule 41(e), Fed. R. Crim. P. In effect this is a motion to suppress. *Id.* The Church asserts four grounds for invalidating the seizure: The warrant was overbroad – or "general" – on its face; the agents conducted the search in a manner violative of the Fourth Amendment; the agents employed unnecessary force in violation of 18 U.S.C. § 3109; and any probable cause that might have been established by the affidavit had grown stale by the time it was executed.

Having considered the memoranda filed by representatives of the Church and of the government and heard their oral arguments with respect to the warrant's facial validity, I find I need go no further. I hold that the grant of authority to the agents to search for and seize any evidence of conspiracies to steal government property and to obstruct justice[3] amounted to a "general warrant" and therefore contravened the Fourth Amendment's

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[3] It should be noted that item 162 of the warrant appears to permit seizure of evidence of *any* conspiracy. I reject such a construction, however, in light of the emphasis in the affidavit on the two types of conspiracies I have mentioned.

guarantee against unreasonable searches and seizures. I am not persuaded that the Supreme Court's recent decision in *Andresen v. Maryland*, 427 U.S. 163 (1976), is to the contrary.

I

The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, *and particularly describing the place to be searched and the persons or things to be seized.* (Emphasis added.)

The Fourth Amendment serves to prevent both unjustified and arbitrary interferences with personal security and property.[4] In the first instance the amendment is designed to ensure that the government cannot interfere with a person's security unless it has a good reason for doing so. The *particularity* requirement ensures as well that the government cannot conduct a search indiscriminately, as by rummaging through a person's belongings in search of any evidence of any crime whatsoever. It accomplishes this end in two ways. First, it leaves to a neutral judicial officer the initial decision as to what can be seized.[5] Second, it circumscribes the permissible

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[4] *See generally* Amsterdam, *Perspectives On the Fourth Amendment*, 58 Minn. L. Rev. 349, 410-12 (1974).

[5] The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is to be left to the discretion of the officer executing the warrant. *Marron v. United States*, 275 U.S. 192, 196 (1927).

bounds of the search itself; as a commonly-used example illustrates, an officer executing a warrant could not reasonably expect to find a stolen elephant in a kitchen closet or in the drawer of a desk.

As particularity is required, so necessarily is generality forbidden. Opposition to the so-called "general warrant" has firm roots in the history of Anglo-American law. As Justice Stewart has observed, writing for a majority of the Supreme Court in *Stanford v. Texas*, 379 U.S. 476, 481-82 (1965):

> These words [commanding a particularized description of the place to be searched and the persons or things to be seized] are precise and clear. They reflect the determination of those who wrote the Bill of Rights that the people of this new Nation should forever 'be secure in their persons, houses, papers, and effects' from intrusion and seizure by officers acting under the unbridled authority of a general warrant. Vivid in the memory of the newly independent Americans were those general warrants known as writs of assistance under which officers of the Crown had so bedeviled the colonists. The hated writs of assistance had given customs officials blanket authority to search where they pleased for goods imported in violation of the British tax laws. They were denounced by James Otis as 'the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book,' because they placed 'the liberty of every man in the hands of every petty officer.' The historic occasion of that denunciation, in 1761 at Boston, has been characterized as "perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country. 'Then and there,' said John Adams, 'then and there was the

> first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child of Independence was born.'" *Boyd v. United States,* 116 U.S. 616, 625 (1886).

Also it is significant, in considering the propriety of seizure of a Church's documents, that the First and Fourth Amendments share at least in part a common heritage.

> Historically the struggle for freedom of speech and press in England was bound up with the issue of the scope of the search and seizure power.

Marcus v. Search Warrants, 367 U.S. 717, 724 (1961). In fact, unlimited power to search was first directed at non-conforming religious groups.

> In Tudor England officers of the Crown were given roving commissions to search where they pleased in order to suppress and destroy the literature of dissent, both Catholic and Puritan.

Stanford v. Texas, supra, at 482.

I make reference to the First Amendment not to suggest that overtones of religious persecution attend the criminal investigation of the Church of Scientology, but to make clear the need for increased sensitivity in cases in which religious organizations are involved, irrespective of the nature or gravity of the charges against them. *Cf. Stanford v. Texas, supra; Marcus v. Search Warrants, supra.*

The flaw I find in the warrant involved here is precisely the evil that inheres in general warrants. The warrant in this case authorized – if indeed it did not direct – agents of the FBI to examine carefully and completely the contents of every document in the fourth-floor files of the Church and to make ad hoc, on-the-spot decisions as to which of those documents constitute evidence of con-

spiracy – an amorphous and open-ended crime that, as discussed below, has since its conceptual inception perplexed commentators and courts alike. In my view this warrant – addressed as it is to the crime of conspiracy – invited the agents to seize any documents in the Church's files that struck their fancy. As the Supreme Court put it in another context in *Marcus v. Search Warrants, supra:* "The warrants gave the broadest discretion to the executing officers; they left to the judgment of each of the many police officers involved the selection of such magazines as in his view constituted 'obscene publications.'" 367 U.S. at 732. In the present context as well, the sweep of that discretion is constitutionally intolerable.

II

The government rests its case, and quarrels with the analysis presented above, primarily on the authority of *Andresen v. Maryland,* 427 U.S. 463 (1976). In fact, as counsel for the government has indicated, the warrant involved in this case was patterned after the one at issue in *Andresen.* As I have suggested, I do not believe that *Andresen* stands for the proposition that a warrant authorizing search for evidence of particular conspiracies comports with the particularity requirement of the Fourth Amendment. Nevertheless, *Andresen* closely resembles the present case in numerous respects and obviously must be examined here.

Andresen can best be understood in the light of the Supreme Court's earlier opinion in *Warden v. Hayden,* 387 U.S. 294 (1967). In *Warden* a majority of the Court joined in abandoning the so-called "mere evidence" rule, which had prohibited seizure of items having only evidential value as distinguished from contraband, fruits and instrumentalities of crime. *Warden* involved a "hot pur-

suit," *warrantless* search that culminated in retrieval not only of a robbery suspect, weapons, and ammunition he allegedly used, but also of clothing he allegedly wore during the robbery, found in a washing machine in the basement of his house. The Court was hard put, on the facts of that case, to draw distinctions in terms of interests the Fourth Amendment is designed to protect between the clothing, on the one hand, and the weapons and ammunition, on the other. Chief Justice Warren and Justice Fortas concurred in the result only, expressing apprehension that abandonment of the "mere evidence" rule was not only unnecessary but also likely to destroy the Fourth Amendment's prohibition against general searches. 387 U.S. at 310-12. Justice Douglas dissented vigorously on essentially the same ground. *Id.* at 312-25[.]

At the time of the Court's decision in *Warden*, despite some ambiguity it was generally assumed that the *Fifth* Amendment stood as a bar to *seizure* of an individual's personal papers, as well as to compelled *production* of such papers. *E.g., Boyd v. United States*, 116 U.S. 616 (1886). *Warden*, however, expressly left open the question whether that was so. 387 U.S. at 303.

The Supreme Court apparently determined to resolve much of this ambiguity in *Andresen*. It upheld a conviction for the crime of "false pretenses" as defined by Maryland law, *see* Md. Ann. Code, Art. 27, § 140 (1976), over petitioner's contentions that the Fifth Amendment barred seizure of his personal business records and that warrants authorizing searches for documents in his offices were unconstitutionally general. The warrants at issue directed seizure of certain specified "items pertaining to sale, purchase, settlement and conveyance of lot 13, block T, Potomac Woods subdivision, Montgomery County, Maryland," 427 U.S. at 480 n. 10, "together with

other fruits, instrumentalities and evidence of crime at this [time] unknown." *Id.* As does the Church here, Andresen based his "generality" argument on the catch-all phrase at the conclusion of each warrant. He contended, according to the Court, that the "other-fruits" clause permitted the executing officers to search for and seize evidence of any crime.

After rejecting petitioner's Fifth Amendment claim, for reasons not germaine here, the Court began its Fourth Amendment analysis by reaffirming the rule that:

> General warrants, of course, are prohibited by the Fourth Amendment. "[T]he problem [posed by the general warrant] is not that of intrusion *per se*, but of a general, exploratory rummaging in a person's belongings. . . . [The Fourth Amendment addresses the problem] by requiring a 'particular description' of the things to be seized. *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971). This requirement " 'makes general searches impossible and prevents the seizure of one thing under a warrant describing another. *As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.*' " *Stanford v. Texas*, 379 U.S. 476, 485 (1965), quoting *Marron v. United States*, 275 U.S., at 196.

Andresen v. Maryland, supra, 427 U.S. at 480 (emphasis added). The Court then stated that, taken in context, the

> challenged phrase must be read as authorizing only the search for and seizure of evidence relating to 'the crime of false pretenses with respect to Lot 13T. . . .'

Id. (Citation omitted.) Since the warrants therefore "did not authorize the executing officers to conduct a search for evidence of *other* crimes," said the Court, they did not run afoul of the particularity requirement. *Id.* at 481-82 (Emphasis added.)

Petitioner in *Andresen* had a second Fourth Amendment claim, which pertained to documents referring to a lot other than 13T that were seized pursuant to a clause in the warrant authorizing search for "books, records, documents, papers, memoranda and correspondence, showing or tending to show a fraudulent intent, and/or knowledge as elements of the crime of false pretenses...." Id. at 481 n. 10. Apparently he contended that these items were irrelevant to the charge concerning Lot 13T and therefore should have been suppressed according to *Warden v. Hayden, supra.* The Court disagreed, observing that intent to defraud is an element of the crime of false pretenses in Maryland and that it is well settled that "proof of similar acts is admissible to show intent or the absence of mistake." *Andresen, supra,* at 483. Moreover, said the Court,

> Lot 13T and the other lot [about which evidence was seized] had numerous features in common. Both were in the same section of the . . . subdivision; both had been owned by the same person; and transactions concerning both had been handled by petitioner. Most important was the fact that there were two deeds of trust in which both lots were listed as collateral.

Id. at 484.

III

The government apparently would have me read *Andresen,* in conjunction with *Warden v. Hayden,* as sanctioning any warrant that directs the executing officers to search for "evidence of" a particular crime. The logic of the government's position is clear and, I admit, parallels statements made by the Court in *Andresen:* If the affidavit and warrant together identify in precise

terms the crime believed to have been committed, and the warrant directs the agents to search for "evidence of" that crime, then the agents have no discretion to search for evidence of other crimes, and the particularity requirement is satisfied.

Were the government correct, the particularity requirement would be rendered a nullity. Hence I cannot believe that the Court intended *Andresen* to be interpreted so broadly, or so literally. For a warrant must satisfy *both* the probable cause and particularity commands, not simply the former: "[N]o Warrants shall issue, but upon probable cause [to believe a *particular* crime has been committed], . . . *and* particularly describing the place to be searched and the persons or things to be seized." U.S. Const. amend IV (emphasis added). To say that mechanical inclusion of the phrase "evidence of" in a warrant automatically and necessarily renders it particular rather than general is to say, simply, that we no longer prohibit general searches.

To be sure, searches for "evidence of" crimes are no longer prohibited, and in *Andresen* the Court did validate a warrant authorizing just that. This in no way means, however, that the particularity requirement has been discarded along with the "mere evidence" rule; rather, the government can safely assume only that searches for *particular evidence* will be condoned. As the Court put it in *Warden*,

> if . . . rejection [of the "mere evidence" rule] does enlarge the area of permissible searches, the intrusions are nevertheless made after fulfilling the probable cause *and particularity* requirements of the Fourth Amendment. . . .

387 U.S. 390 (emphasis added).

Andresen must, I believe, be read in the light of the Court's reiteration of our historical proscription of general warrants and the Court's statement, derived from numerous prior cases, that *"[a]s to what is to be taken, nothing is left to the discretion of the officer executing the warrant."* 427 U.S. at 480 (emphasis added). I do not take this statement literally to mean that the executing officer can make no determinations at all with respect to what is to be seized. Such an application of the Court's language would require me to ignore the rule permitting the executing officer to seize manifestly criminal objects such as contraband that he encounters inadvertently in plain view.[6] What I do take the Court to mean, however, is that a neutral and detached judicial officer must in the first instance ensure that strict standards exist to guide the officer in his exercise of discretion. Evidently the majority[7] of the Court was satisfied that the judicial officer who issued the warrant in *Andresen* could reasonably have concluded that a search for evidence pertaining to the sale of a specific parcel of real estate – precisely and unmistakably identified as "Lot 13T" – is sufficiently circumscribed to comport with the rule against discretionary searches and seizures. Presumably the agents could readily determine whether a particular document pertained to that lot simply by inspecting its contents in a cursory fashion – that is, by keying on the magic words, "Lot 13T." Thus they could instantly seize – or elimi-

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[6] *E.g., Alderman v. United States,* 394 U.S. 165, 177 n. 10 (1969) (dictum); *see also* Amsterdam, *supra* note 4, at 358.

Whether documentary evidence in a person's files can be encountered "inadvertently" is a question that is sure to arise. I would have grave apprehensions about such an application of the "plain view" doctrine.

[7] Justices Brennan and Marshall each wrote a dissenting opinion. 427 U.S. at 484; *id.* at 493.

nate from their scrutiny – any document that on its face did not relate to that property.[8]

Try as the government might; the same cannot be said about a search for evidence of a conspiracy – irrespective of the precision with which the underlying substantive offense is described.[9] Indeed, because of the permissive rules of evidence available to prosecutors seeking to prove conspiracy, in this context especially the distinction the government urges between impermissible searches for evidence of *any crime* and permissible searches for evidence of a *particular crime* is patently hollow. For there is nothing "particular" about conspiracy. As counsel for the Church points out, perhaps the best known statement in our jurisprudence concerning the law of conspiracy was that of Justice Jackson in *Krulewitch v. United States*, 336 U.S. 440 (1949):

> The modern crime of conspiracy is so vague that almost defies definition. Despite certain elementary and essential elements, it also, chameleon-like, takes on a special coloration from each of the many independent offenses on which it may be overlaid. It is always 'predominantly mental in composition' because it consists of a meeting of minds and an intent.

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[8] I must admit that the Court's sanction of the seizure of evidence of "intent" or "absence of mistake" casts some doubt upon the issue involved here. However, the Court limited its sanction to evidence of similar transactions that related closely and objectively to Lot 13T, i.e., evidence pertaining to a second lot that was listed as collateral together with Lot 13T in two deeds of trust. 427 U.S. at 484. In so doing, the Court appeared to be embracing the rationale I have espoused in the text.

[9] In the present case, one of the underlying substantive offenses is obstruction of justice. That in itself is a rather amorphous crime, and remains so despite the detail with which the alleged plot is described in the affidavit.

> The crime comes down to us wrapped in vague but unpleasant connotations. It sounds historical undertones of treachery, secret plotting and violence on a scale that menaces social stability and the security of the state itself. . . .
>
> . . .
>
> [E]ven when appropriately invoked, the looseness and pliability of the doctrine present inherent dangers which should be in the background of judicial thought wherever it is sought to extend the doctrine to meet the exigencies of a particular case.

Id. at 446-47, 449. Inasmuch as conspiracy "almost defies definition," it is no surprise that the rules of evidence that pertain to it are loose and pliable as well. This is so principally because the underlying substantive offenses do not limit the scope of relevant evidence that might be introduced at trial. Rather, evidence of conspiracy could also include evidence of *any* action taken by one of the accused confederates – no matter how trivial or manifestly innocuous on its face – that might somehow be connected to an agreement to commit the substantive offenses, or be said to constitute an act in furtherance of such an agreement. *See, e.g.*, Wharton, *Criminal Evidence*, § 642 (13th ed. 1973). Thus "evidence of conspiracy" is a virtually open-ended proposition.

It seems self evident then, in considering both the warrant and the affidavit supporting it, *see Moore v. United States*, 461 F.2d 1236, 1238 (D.C. Cir. 1972), that the agents in this case had no clear standard to guide their exercise of discretion. Item 162 of the warrant authorized them to search for and seize "evidence at this time unknown" of the two conspiracies outlined in the affidavits. Such evidence, quite clearly, is of a character substantially different from the evidence involved in

Andresen. In that case, subjective judgments by the officers as to what may or may not be evidence were narrowly confined by the *objects* of the search – documents pertaining to the sale of a specific parcel of real estate, precisely identified as "Lot 13T." Thus a search for "unknown evidence" pertaining to a single real estate transaction may be said to be particular in the sense that the agents know essentially what they are looking for, and definite limitations exist with respect to their exercise of discretion as to what to seize. In the present case, by contrast, despite the detail with which the alleged conspiracies to burglarize government offices, steal government property, and obstruct the criminal investigation are described in the affidavit, the potential fruits of the search were limited only by the number of documents in the Church's files. To be sure, the affidavit provided the agents with substantial guidance as to what to look for. But neither the warrant nor the affidavit – nor both construed together – placed practical limitations upon their determinations respecting what to seize. For unless the contents of any particular document rendered it manifestly criminal, the decision whether to seize it was complicated by the subjective considerations attending the law of conspiracy. In effect, each agent had been delegated authority to consider the relevance of the documents according to his own subjective standards as to what evidences the conspiracies suggested by the affidavit. As a practical matter, therefore, a directive to seize "evidence at this time unknown" of conspiracy is a "wild card" permitting seizure of anything at all. In terms of the damage done to the Church's interest in freedom from unjustified, indiscriminate seizures, item 162 is indistinguishable from a warrant to seize evidence of "any crime."

Under the circumstances of this case, the government's argument that the affidavit was sufficient to establish the necessary particularity is on especially tenuous ground. For the government concedes that "certain documents... should not have been seized," that indeed "approximately half of the documents will be returned. . . ." Memorandum in Opposition To Motion For Return of Property at 4. Though, as the government suggests, the fact of improper *seizure* may not *ipso facto* demonstrate an improper *warrant*, that fact certainly provides strong indication that the agents themselves did not construe the affidavit as limiting their discretion.

Moreover, even assuming *arguendo* that the government's broad interpretation of *Andresen* is the correct one, I would still find it difficult to condone a warrant authorizing search for and seizure of evidence of conspiracy "at this time unknown." For unless the warrant directed the executing officers to seize *only evidence objectively pertaining to specific acts of conspiracy identified in the affidavit* – as distinguished from evidence of any potential act in furtherance of the conspiracies described – the officers would maintain their license to rummage through the files and take whatever they pleased. Indeed, even a warrant authorizing search only for unknown documents pertaining to specific acts of conspiracy would seem to suffer for want of particularity. Execution of such a warrant, again, would vest in the agents discretion to make difficult, subjective determinations with respect to relevancy. Thus I must admit that I have serious doubts whether any warrant authorizing search for and seizure of "documentary evidence of conspiracy at this time unknown" could withstand constitutional scrutiny.

IV

I recognize and share the Supreme Court's concern that the "complexity of an illegal scheme . . . not be used as a shield to avoid detection when the State has demonstrated probable cause to believe that a crime has been committed and probable cause to believe that evidence of this crime is in the suspect's possession." *Andresen, supra,* 427 U.S. at 481 n. 10. At the same time, of course, a complex legal scheme cannot be used as a shield from the commands of the Fourth Amendment. Thus it may be said that a far-flung criminal scheme – such as conspiracy – *justifies* an equally far-flung search for evidence of that scheme. The Fourth Amendment, however, as the Court has repeatedly recognized, commands more than a justification for an intrusion into a person's privacy. It also commands that no such intrusion be executed in an *arbitrary,* or indiscriminate manner. Thus steps must be taken to ensure that the intrusion is confined to its justifiable limits. This is so especially where searches for documents are involved.

> We recognize that there are grave dangers inherent in executing a warrant authorizing a search and seizure of a person's papers that are not necessarily present in executing a warrant to search for physical objects whose relevance is more easily ascertainable. . . . In both kinds of searches, responsible officials, including judicial officials, must take care to ensure that they are conducted in a manner that minimizes unwarranted intrusions upon privacy.

Andresen, 427 U.S. at 482 n. 11. This rationale, it seems to me, applies with still more force in a case involving a search through a religious organization's files.

Once government agents have a search warrant in hand, only the requirement that the warrant "particularly describ[e] the place to be searched, and the persons or things to be seized" serves to protect citizens from unjustified interferences with personal security or property. The particularity requirement – and nothing else – confines the intrusion to its justifiable limits.[10] In *Andresen* the Supreme Court evidently believed that the precision of the term "Lot 13T" was sufficient to accomplish that purpose. Here, however, there is no such precision. This is why the warrant cannot stand.

ORDER

Upon consideration of the foregoing assessment of the challenged process, the Court ORDERS that the government, forthwith:

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[10]Had the warrant authorized only seizure of items one through 161, for example, the resulting interference with the Church's privacy would have been narrowed considerably. First, the agents could have removed from the Church's files only the items listed specifically in the warrant. Second, specification of the things to be seized would have altered the search-process itself. Each of the specified items has certain objective, readily identifiable earmarkings – name of author or addressee, date, title and the like. Thus in one respect or another each item is similar to a document pertaining to "Lot 13T." Presumably the Church has imposed some system of order on its files, most likely by alphabetizing them. The agents, then, could first have looked in the specific sections of the files in which the documents would most likely be found. If perchance the agents succeeded immediately in locating the documents sought, no justification would have existed to search further, and no other documents could have been disturbed. Assuming the files had no order whatever or the specified items were randomly interspersed throughout them, the agents could have inspected each document in the files in cursory fashion, keying on the objective earmarkings specified in the warrant. Thus the agents would not have had authority to consider and take with them those secrets of the Church which should have been left alone.

(1) return to petitioner all material seized on July 8, 1977 in a search of its premises by agents of the Federal Bureau of Investigation under color of authority of a warrant dated July 4, 1977;

(2) destroy any and all copies of such materials in its possession or control and any and all fruits of the search and seizure, including but not limited to notes, memoranda, correspondence, photographs or other materials seized or any information otherwise gleaned during or as a result of the search;

(3) retrieve any copies of any materials seized or any fruits of the search and seizure which have been disseminated to any persons outside the Fraud Section of the United States Attorney's Office, including any copies of such items or notes or memoranda concerning them made by such persons:

(4) destroy all materials retrieved pursuant to paragraph (3) of this order without making copies thereof or notes concerning them; and

(5) report in detail in writing to this Court, with copy to counsel for petitioner, on its compliance with the terms of this order not later than one week from the date hereof.

And it is further ORDERED
that execution of the above is stayed pending final resolution of this matter if the government elects to appeal; otherwise its terms shall be effected automatically upon expiration of the time allotted for filing notice of appeal. In the interim the documents shall be impounded by the Clerk.

/s/ William B. Bryant
Chief Judge

July 27, 1977
Date

APPENDIX G

Affidavit for Search Warrant

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 77-0696M

UNITED STATES OF AMERICA

v.

PREMISES LOCATED AT
2125 S STREET, N.W., WASHINGTON, D.C.

BEFORE: Henry H. Kennedy, Jr., Washington, D.C.

The undersigned being duly sworn deposes and says:

That he has reason to believe that on the premises known as The Founding Church of Scientology, 2125 S Street, N.W., Washington, D.C. in the District of Columbia there is now being concealed certain property, namely (see attached Description of Property) which are the fruits and evidence of violations of 18 U.S.C. 371 (Conspiracy); 18 U.S.C. 1503 (Obstruction of Justice); 18 U.S.C. 641 (Theft of Government Property),

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows: (see attached Affidavit).

/s/ Robert Tittle
Federal Bureau of Investigation,
Special Agent

Sworn to before me, and subscribed in my presence, July, 1977.

/s/ Henry H. Kennedy, Jr.
Judge or Federal Magistrate

DESCRIPTION OF PROPERTY

1. Memo dated 3/6/69 to Will Wilson from David Bress re: *Founding Church of Scientology v. United States,* No. 21,483.
2. Memo to Solicitor General from Will Wilson re: No. 21,483 Petition for Certiorari recommended.
3. Memo dated 9/2/69 to the Solicitor General re: Founding Church of Scientology, Washington, D.C. discussing, *inter alia,* time for petition for certiorari extended to 9/15/69.
4. Memo dated 8/27/69 to Solicitor General from Lawrence Wallace re: No. 21,483.
5. Memo dated 9/15/69 to Joseph Hannon from Thomas Flannery re: No. 21,483.
6. Letter dated 7/23/70 to Will Wilson from Thomas Flannery re: *United States of America v. An Article or Device* (E-Meter case).
7. Letter dated 9/9/70 to Flannery from William Goodrich, Food and Drug Administration, re: E-Meter case, Civ. No. 1-63.
8. A file consisting of seven (7) pages labelled: A-F 21-126 File, described further as follows: Brown paper with a file number and the date 6/14/73; copy of letter (1 page), 3/1/73, from FDA to

non-federal agency; copy of letter (4 pages) 9/8/72, from individual to non-federal law enforcement official.

9. Letter dated 7/5/71 to Miss Raymonde I. Paul from Pearl Emily Harlan.
10. Letter dated 7/16/71 to Rev. Mrs. Beth Fordyce from Pearl Emily Harlan.
11. Letter dated 10/27/71 to Miles W. Kirkpatrick from Pearl Emily Harlan.
12. Letter dated 2/6/72 to Joseph Hannon from Cyril Vosper.
13. Letter dated 6/4/73 to Joanne Sisk from Van Miller.
14. Memo dated 7/5/63 to files from ELP re: *United States v. Hubbard.*
15. Memo dated 3/26/64 to files from JMH re: Hubbard, etc.
16. Letter dated 3/29/69 to Nathan Dodell from Ralph R. Rash.
17. Letter dated 6/19/69 to Nathan Dodell from Ralph R. Rash.
18. Letter dated 7/24/69 to Ralph R. Rash from Joseph Hannon.
19. Letter dated 2/1/74 to James H. Estabrook from Arnold Aikens.
20. Letter dated 2/20/63 to Robert F. Kennedy from G. Franklin Montgomery.
21. Letter dated 3/27/67 to M. J. Ryan from John I. Lacey.
22. Letter dated 3/29/67 to John I. Lacey from Ernest L. Brisson.

23. Letter dated 5/17/71 to Thomas M. Brown from Bernard T. Loftus.

24. Letter dated 2/13/63 to David Acheson from William W. Goodrich re: Civ. No. 1-63.

25. Memo dated 2/13/63 to Director, Baltimore District from Inspector Paul Lankford, re: Scientology—Annual Reports.

26. Memo dated 4/23/63 to Director, Detroit District from Inspector E. A. Maciejewski.

27. Memo dated 6/17/65 to Director, Chicago District from Inspector Robert W. Case.

28. Memo dated 1/13/75 to Edward Hidalgo from Simon Bourgin re: California Church posing as U.S. Information Agency.

29. File containing the three-page typed statement of Emylee Lynne Miller dated 21 October, 1974 in a Defense Communications Agency file entitled "Walk-in Informant".

30. Court pleading in Civil Action 75-1471, *Founding Church of Scientology of Washington, D.C. v. Simon*—the Affidavit and attachments of Louis B. Sims.

31. A sheaf of approximately forty documents labelled "Documents denied in entirety" comprised of correspondence between and among members of INTERPOL requesting and transmitting information concerning L. Ron Hubbard and Scientology.

32. Memo dated 4/22/75 to file from Louis B. Sims re: Interview by Vaughn Young of 4/21/75.

33. A small sheaf of approximately ten documents labelled "partially disclosed on 5/9/75" comprising correspondence between and among members of

INTERPOL requesting and transmitting information concerning L. Ron Hubbard and Scientology.

34. Letter dated 10/17/75 to James Stotter II re: Scientology cases from Nathan Dodell.

35. A document entitled "Evaluation of: Narconon New Life, 827 Beacon Ave., Los Angeles, Calif. 90017, dated October 31, 1974.

36. Memo dated 11/25/58 to files from Edward P. Troxell re: Scientology. Report of Inspectors Joseph R. North and Edward H. Wilkins.

37. Memo dated 12/2/58 to files from Troxell re: L. Ron Hubbard, Scientology, etc.

38. Memo dated 1/7/59 to files from Troxell re: Scientology, etc.

39. Memo dated 1/15/59 to Oliver Gasch from Troxell re: Scientology, L. Ron Hubbard.

40. Memo dated 1/15/59 to Oliver Gasch from Troxell re: Scientology, L. Ron Hubbard and the College of Mental Science, Arthur Jay Green, Dean, 7426 13th Street, N.W., Washington, D.C.

41. Copy of letter dated 1/28/59 to Oliver Field, M.D. from Zigmond M. Lebensohn, M.D.

42. Memo dated 3/16/59 to files from Troxell re: Ernest Alsvary.

43. Memo dated 11/3/59 to Roy E. Blick from Capt. Ernest P. Jefferson re: Investigation of Lafayette Ron Hubbard and the various Hubbard Foundations.

44. Letter dated 7/25/58 to Roy E. Blick from Saleem Alam Shah, Ph.D.

45. Memo dated 11/18/58 to File from Marcy Lehman re: Dr. L. Ron Hubbard.

46. Confidential Memo of the Metropolitan Police Department. dated 3/11/59, Narcotic Squad, Washington, D.C., re: Alsvary.

47. Memo dated 3/11/59 of Metropolitan Police Department Narcotic Squad to files re: Hubbard Investigation—Alsvary.

48. Memo dated 3/12/59 to files from Troxell re: Scientology.

49. Memo dated 3/16/59 to files from Troxell re: Ernest Alsvary.

50. Memo dated 3/31/59 to files from Troxell re: Alsvary.

51. Letter dated 11/20/58 to Robert Morrison from Oliver Gasch re: L. Ron Hubbard.

52. Letter dated 11/20/58 to David D. Furman from Oliver Gasch re: L. Ron Hubbard.

53. Letter dated 11/20/58 to Thomas D. McBride from Oliver Gash re: L. Ron Hubbard.

54. Letter dated 11/20/58 to Harold K' Wood from Oliver Gasch re: L. Ron Hubbard.

55. Letter dated 11/20/58 to Wilbur G. Leonard from Oliver Gasch re: L. Ron Hubbard.

56. Letter dated 11/25/58 to Gasch from Joseph L. Cohen re: OG:EPT:acs.

57. Letter dated 11/26/58 to Gasch from Louis C. Bechtle re: *United States v. Kish, et al.*

58. Letter dated 12/15/58 to Gasch from Robert Carpenter re: Investigation of Hubbard Institute-Freudian Foundation.

59. Letter dated 1/7/59 to Gasch from Andrew A. Salvest re: L. Ron Hubbard.

60. Letter dated 4/3/59 to Gasch from Wilbur G. Leonard re: Hubbard Dianetic Foundation, Inc. Bankruptcy 379 B 2.

61. Letter dated 2/9/53 to Eugene Davis from Lynn R. Brodrick re: Hubbard Dianetic Foudnation, Inc.

62. Letter dated 4/7/59 to Gasch from George T. Bebber re: Hubbard Dianetic Foundation, Inc.

63. A file labelled Longo Test Correspondence.

64. Memo dated 3/16/59 to Chief, Baltimore District from Inspector Taylor M. Quinn, re: Sunday night meeting of Founding Church of Scientology.

65. Memo dated 3/18/59 to Chief, Baltimore District from Inspector Taylor M. Quinn, re: visit to Academy of Scientology for Purpose of Signing up for a Course.

66. Memo dated 3/19/59 to Files from Troxell re: Mr. Quinn, FDA.

67. Memo dated 3/20/59 to Chief, Baltimore District from Quinn re: Tests taken at Academy of Scientology on afternoon of 3/20/59.

68. Memo dated 3/23/59 to Chief, Baltimore District from Quinn re: first day of HAS course at Academy of Scientology.

69. Memo dated 3/24/59 to Chief, Baltimore District from Quinn re: second day of HAS course at Academy of Scientology.

70. Memo dated 3/25/59 to Chief, Baltimore District from Quinn re: third day of HAS course at Academy of Scientology.

71. Memo dated 3/26/59 to Chief, Baltimore District from Quinn re: fourth day of HAS course at Academy of Scientology.

72. Memo dated 3/27/59 to Chief, Baltimore District from Quinn re: fifth day of HAS course at Academy of Scientology.

73. File Captioned Col. Routledge.

74. Memo to files dated 2/16/59 from Seymour Raboy, Metropolitan Police Department Narcotic Squad re: meeting of Founding Church of Scientology on 2/15/59 at 1812-19th St., N.W.

75. Memo to files dated 2/22/59 from Joseph W. Somerville, MPD Narcotic Squad re: Founding Church of Scientology meeting 2/22/59 at 1812 19th St., N.W.

76. Memo to files dated 3/2/59 from Seymour Raboy, MPD Narcotic Squad re: Founding Church of Scientology meeting 3/1/59 at 1812-19th St., N.W.

77. MPD Narcotic Squad inventory dated 1/15/59 of books and documents turned over to Dr. Inez Wilber.

78. Memo to files dated 2/9/59 from Troxell re: Scientology.

79. Memo dated 2/11/59 to Troxell from E. Riley Casey re: Definition of Religion and Religious Society . . . .

80. Memo dated 2/10/59 to Gasch from Troxell re: interview of Dr. William G. Frank.

81. Memo to files dated 3/11/59 from Troxell re: Interview with Inman H. Douglas.

82. Undated eleven-page memo to Deputy Chief Roy E. Blick of Morals Division, Metropolitan Police Department, re: Scientology and Jefferson.

83. Undated three-page memo to Blick re: Scientology and Jefferson.

84. Memo to files dated 1/27/59 from Troxell re: Scientology, Jefferson and Longo.

85. Memo dated 3/3/59 to Blick re: Scientology.

86. Letter dated 8/12/59 to Troxell from K. L. Milstead of Health, Education and Welfare.

87. HEW seven-page Inspection Report dated 6/2/59, re: E-Meters, signed by Fred Shallit.

88. Letter dated 11/28/58 to Troxell from Zigmond M. Lebensohn, M.D.

89. Letter dated 4/29/59 to Theodore Wiprud from Lebensohn.

90. One page document dated 4/19/59 captioned Information from Mrs. Theodore Peck, JE2 0367.

91. Letter dated 4/29/59 to Theodore Wiprud from Lebensohn.

92. Letter dated 4/30/57 to Peck from Lebensohn.

93. Letter dated 4/25/57 to Theodore Wiprud from Paul Foley.

94. Letter dated 1/29/59 to Gasch from Oliver Field of American Medical Association.

95. Letter dated 1/11/59 to Gasch from Richard J. Plunkett, of AMA.

96. Memo to files dated 12/2/58 from Troxell re: L. Ron Hubbard.

97. Memo to files dated 12/10/58 from Troxell re: Scientology.

98. Memo to files dated 1/7/59 from Troxell re: Scientology, etc.

99. Memo to files dated 2/9/59 from Troxell re: Scientology.

100. Letter dated 1/26/76 to Robert Elliott from James Stotter II re: *Church of Scientology of California v. United States Department of Justice,* CV 74-3550.

101. Memo dated 1/23/76 to J. F. Axelrad from Robert Elliott re: *Church of Scientology v. Drug Enforcement Administration.*

102. Memo dated 12/18/75 to file from Stotter re: *Church of Scientology v. DEA.*

103. Letter dated 12/17/75 to Chief Rocky Pomerance from Richard C. Clement.

104. Memo dated 12/15/75 to Figley from Elliott re: *Church of Scientology of California v. United States Department of Justice,* CV 74-3550.

105. Five letters dated 12/12/75 from U.S. Marshal in the Southern District of New York enclosing subpoenas for *Church of Scientology of California v. U.S. Department of Justice,* CF 74-3550 for the following persons: James Taylor, Vernon J. Calhoun, William J. Baum, Lawrence G. Waldt, Rocky Pomerance.

106. Cable dated 12/11/75 to DEA in Paris re: *Church of Scientology v. DEA* from Bruce Jensen.

107. State Department telegram dated 12/8/75 to DEA in the District of Columbia from the American Embassy in Paris.

108. Memo dated 12/10/75 to Special Authorizations Unit from Donald Miller.

109. Memo of Conversation dated 6/27/75 re: FOI: Information Received from the GOC in Confidence.

110. Aide-Memoire from Canadian Embassy dated 6/27/75.

111. Eight (8) letters dated 11/20/75 to the following persons from Henry Dogin, DEA: Francois le Mouel, David Dilley, Vernon J. Calhoun, William Baum, Robert Bermingham, Rocky Pomerance, James Taylor, Lawrence Waldt.

112. Cable dated 10/8/75 from Secretary of State in Washington, D.C. to Paris and London Embassies.

113. Memo dated 10/6/75 to Stotter from Elliott re: testimony *Church of Scientology of California v. U.S. Department of Justice,* CV 74-3550-F.

114. Letter dated 9/26/75 to Mouel from Dogin.

115. Letter dated 9/4/75 (in French) to Dogin from Devaudan (Plus the translation into English).

116. Cable dated 10/8/75 from American Embassy in Paris to Secretary of State in Washington re: disposition of French official in *Church of Scientology of California v. U.S. Department of Justice,* CV 74-3550.

117. Memo dated 6/17/75 to Susan M. Hauser from Bruce Jensen re: George Bristol III.

118. Letter dated 5/29/75 to Bruce Jensen from George Bristol III.

119. Memo dated 4/16/75 to Attorney General from Director, FBI, re: Freedom of Information Act.

120. Memo dated 4/11/75 to Axelrad from Richard Lavine re: *Church of Scientology v. Department of Justice,* CV 74-3550.

121. Letter dated 1/10/75 to Carla Hills from John Bartels re: case 74-3550-F.

122. List of Department of Justice Civil Division Attorneys (new assignment of case sheet).

123. Memo dated 4/2/75 to U.S. Attorney from Irving Jaffe re: Civ. 74-986.

124. Memo dated 3/11/75 to Assistant Attorney General (Attn: Axelrad) from Director, FBI, re: 74-906.

125. Eighteen-page letter dated 3/12/75 to Hills Attn: Leathers from Hugo Ranta re: *Church of Scientology v. Kelly*, Civ. 74-906.

126. Six-page memo dated 8/6/74 to Assistant Attorney of Civil Division from Director, FBI, re: *Church of Scientology v. Kelly*, Civ. 74-906.

127. Memo dated 6/25/74 to files from Axelrad re: 145-12-2158.

128. Handwritten note on lined legal sized paper headed "Do we concur in filing Motion for SJ".

129. Memo dated 11/1/75 to Figley from James Stotter II re: *Church of Scientology v. Postal Service*, Civ. 75-2004-R.

130. Letter dated 10/17/75 to Figley re: *Church of Scientology v. Postal Service*, Civ. 75-2004-R, from Charles Hawley.

131. Letter dated 11/21/75 to James R. Eooley from Thomas J. Ramsey.

132. Memo (undated) to Mr. Leigh from Henry Kissinger.

133. Memo dated 11/23/70 to Carl E. Stone from Special Investigator, ATF, re: church.

134. Telex dated 11/20/70 to Director, ATF, Washington, D.C. from ATF Seattle re: Steven Heard.

135. Memo dated 12/16/75 to Files from James Stotter II re: *Church of Scientology California v. Department of State,* Civ. 75-2562-F.

136. Undated fourteen-page memo to Stotter from Tom Ramsey re: *Church of Scientology California v. Department of State,* Civ. 75-2562-F.

137. Letter dated 12/19/75 to Axelrad from Norman B. Lynch.

138. Two-page letter dated 4/6/76 to Figley from Guy H. Cunningham re: *Church of Scientology California v. Energy Research Development Administration,* Civ. 76-11-R.

139. Document dated 2/16/76 and captioned "LITIGATION CONCERNING SCIENTOLOGY FOIA REQUEST".

140. Memo dated 4/22/68 to Clement Pallazzo from John C. Fleming re: Dale C. Musser.

141. Memo dated 2/27/67 to W. R. Adair from Pallazzo re: Hubbard Association of Scientologists International.

142. Letter dated 5/23/68 to J. E. Hoover from Earl F. Lane re: Hubbard College of Scientology.

143. Letter dated 8/9/68 to Fleming from Adair re: Hubbard College of Scientology . . . .

144. Letter dated 4/21/68 to U.S. Atomic Energy Commission from Musser.

145. Letter dated 3/26/76 to Cunningham from H. E. Lyon re: Church of Scientology FOIA Request.

146. Memo dated 12/24/75 to Rex Lee from J. Axelrad re: Possible Government Defense of "Harrassment" in FOIA cases.

147. Letter dated 1/19/76 to Dear Sir: from Lorna Levett.

148. Three-page report of statement made by Emylee Lynne Miller on 21 October 1974 to Defense Communication Agency (DCA) employees and reported on DCA Form 341. (This report may have a cover sheet bearing the seal of the DCA stamped "Confidential" or "Highly Sensitive" or "Secret".)

149. Synopsis of Gerald Wolfe's June 10, 1977 Grand Jury testimony.

150. Memorandum, notes or report prepared by Richard Weigand on or about June 12, 1976 relating to Gerald Wolfe, Michael Meisner, about a surreptitious entry into the United States Courthouse building in the District of Columbia.

151. Any notes, memoranda, or reports prepared by Michael Meisner and/or Gerald Wolfe relating to their entry into the United States Courthouse on or about June 11, 1976 and their confrontation with two FBI agents on that date.

152. Guardian Order 1361.

153. Guardian Order 1634.

154. Any and all Guardian Orders issued pursuant to Guardian Order 1634 which would be identified as Guardian Order 1634-(number).

155. A Guardian Order generally identified as "Snow White".

156. Any and all Guardian Orders issued pursuant to the Guardian Order generally identified as "Snow White" which would be identified by the mention of "Snow White".

157. Any and all documents contained in the Operations Files concerning Robert Snyder.

158. Any and all documents of the Internal Revenue Service relating to the Church of Scientology Calif. marked "Confidential, GO 1361 Material". (This would include the Hawaii and California cases.)

159. Any and all documents attached to a memorandum from Mitchell Hermann identified as "Mitch" or Michael Meisner identified as "Mike".

160. Any and all memoranda written by Michael Meisner identified as "Mike" making reference to attached government documents.

161. Any and all documents marked "Non-FOI".

162. Any and all fruits, instrumentalities, and evidence (at this time unknown) of the crimes of conspiracy, obstruction of justice and theft of government porperty in violation of 18 U.S. Code §§ 371, 1503 and 641 which facts recited in the accompanying affidavit make out.

SOURCE OF DOCUMENTS

Items 1-99 lists documents stolen (and copied) from the office of Assistant United States Attorney Nathan Dodell, United States Attorney's Office for the District of Columbia.

Items 100-148 lists documents stolen (and copied) from the office of Staff Attorney Paul Figley, Department of Justice, Washington, D.C.

Items 100-122 are documents relating to the case of *Church of Scientology of California v. United States Department of Justice,* CV 74-3550-F.

Items 123-127 are documents relating to the case of *Church of Scientology of California v. Kelly*, Civil Action 74-906.

Items 128-130 are documents relating to the case of *Church of Scientology of California v. Postal Service*, Civil Action 75-2004-R.

Items 131-132 are documents relating to the case of *Church of Scientology of California v. State Department*, Civil Action 75-2832 AAH.

Items 133-134 are documents relating to the case of *Church of Scientology of California v. Alcohol, Tobacco and Firearms*, Civil Action 75-1699 RFP.

Items 135-136 are documents relating to the case of *Church of Scientology of California v. Department of State*, Civil Action 75-2562E.

Items 138-147 are documents relating to the case of *Church of Scientology of California v. Energy Research and Development Administration*, Civil Action No. 76-11R.

AFFIDAVIT IN SUPPORT OF SEARCH WARRANT

The affiant states that during the course of an investigation into unauthorized entries into the United States Courthouse for the District of Columbia, the use in those entries of fraudulently obtained false Internal Revenue Service identification cards bearing the seal of the United States Department of the Treasury, the theft of government property, as well as a conspiracy to commit such unauthorized entries, the affiant learned the following:

1. From a review of the pleadings and related documents in *United States v. Gerald Bennett Wolfe*, D.C.D.C. Crim. No. 77-283 (Flannery, J.), as well as evidence in support of that criminal case, including the affidavit in support of the arrest warrant for Michael Meisner, U.S. Mag. No. 1101M(Cr.) (D.D.C. August 5, 1976), the physical evidence and reports of the Federal Bureau of Investigation:

In May and June 1976, two individuals, on three occasions, entered the United States Courthouse in the District of Columbia using false Internal Revenue Service credentials. These two individuals on the second occasion were confronted while making surreptitious use of the United States Attorney's Office xerox machines. These are located in an area which is off-limits to the general public. On the third occasion they were stopped by Federal Bureau of Investigation Special Agents on the third floor of the Courthouse which houses the United States Attorney's Office and the District of Columbia Bar Library. One of the two individuals identified himself as Thomas Blake and the other as John Foster. Both had IRS identification cards. However, when Foster was asked about his current employment he stated that he was no longer working at IRS. Subsequent investigation by the FBI revealed that neither identification card had been legitimately issued by the IRS. The individual who carried the Blake identification was in fact Gerald Bennett Wolfe, an IRS clerk-typist. He was subsequently arrested on June 30, 1976. The other individual who accompanied Wolfe in each of the Courthouse entries was identified as Michael James Meisner. A warrant for Meisner's arrest was issued by a United States Magistrate on August 5, 1976. On May 13, 1977, Wolfe entered a plea of guilty to false use of a

government seal (18 U.S.C. § 1017) in the United States District Court for the District of Columbia. On June 10, 1977, Wolfe was sentenced and immediately thereafter appeared before the Grand Jury. On June 20, 1977, Assistant United States Attorney Garey G. Stark was contacted telephonically from Los Angeles by an individual who identified himself as Michael Meisner and who stated that he wished to return voluntarily to the District of Columbia, and cooperate with the United States. Meisner arrived in Washington that evening.[1]

2. The affiant states that he was present during extensive interrogations of Meisner over a two-week period. Mr. Meisner described the criminal acts committed by himself and others on behalf of the Founding Church of Scientology. These criminal acts involve violations of, *inter alia*, 18 U.S.C. § 371 (Conspiracy), 18 U.S.C. § 1503 (Obstruction of Justice); and 18 U.S.C. § 641 (Theft of Government Property). During this period of questioning Mr. Meisner stated the following:

The Founding Church of Scientology was established in the early 1950's by L. Ron Hubbard who remains the highest official in the Church.[2] The Church is organized

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[1]Meisner requested and received for an indefinite period twenty-four-hour witness protective custody under an assumed name from the United States Marshal's Service. See *Allard v. Church of Scientology of California*, 129 Cal. Reptr. 797, *cert. denied*, 97 S. Ct. 1101 (1977), which discusses the Church's "fair game" doctrine. That doctrine requires the Church to attack and destroy its enemies, "suppressive persons" and those, like Meisner, who leave the Church.

[2]The affiant has read transcriptions of a television program and a confidential interview of former Scientologists conducted by the IRS. The affiant states that Meisner's description of the Church, its organizational structure, its programs and purposes

into two main divisions—the "Sea Organization" and the "Guardian's Office." The Sea Organization (so-called because it was originally based on ships at sea) has its headquarters in Clearwater, Florida. Its main function is to administer the day-to-day operations of the various churches and missions in the United States and abroad. The Guardian's Office, on the other hand, is charged with the overall protection of Scientology—the safeguarding of the environment within which the Church exists. The chief officer of the Guardian's Office is Mary Sue Hubbard, L. Ron Hubbard's wife. The "Guardian Office World-Wide" is located in East Grinstead, Sussex, England, and exercises overall supervision over subsidiary Guardian offices located elsewhere about the world. It is headed by Jane Kember, the "Guardian World Wide." [See Appendix I.] It is divided into five bureaus—Information, Public Relations, Legal, Finance and Social Coordination. The United States subsidiary of the Guardian's Office is located at Fifield Manor, 5930 Franklin Avenue, Hollywood, California, and is headed by Henning Heldt. It in turn exercises supervision over all the local Guardian Offices throughout the United States. [See Appendix II.] The Deputy Guardian for Information handles all intelligence matters, including covert operations to acquire government documents critical of Scientology, covert operations to discredit

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find corroboration in public statements made by Lorna Levett, a dissident Scientologist, on the "ABC News Closeup" television broadcast of September 2, 1976 entitled "New Religions: Holiness or Heresy?" The affiant also states that Meisner's description finds more detailed corroboration in a lengthy transcription of a taped interview with a couple referred to as "Ira and Kathy", likewise dissident Scientologists. The interview was conducted by a Special Agent of the IRS on December 27, 1973. Like Meisner, "Ira and Kathy" held sensitive positions of high responsibility within Scientology.

and remove from positions of power all persons whom the Church considers to be its enemies; and internal security within the Church itself. Michael Meisner has been an active member of the Church of Scientology since 1970. Soon after joining, Meisner became a staff member of the Church and has since held various positions, eventually rising to a high level of responsibility. Beginning in January 1974, Meisner was the Assistant Guardian for Information in the District of Columbia. [See Appendix II.] As such, Meisner had direct access to extremely sensitive Church documents—originating at the very highest level of the Church in England and the United States—which authorized the implementation of a policy of infiltration of government agencies and elimination of individuals who were considered enemies of the Church. During his tenure in Washington, Mr. Meisner often visited the Guardian's Offices in Los Angeles to attend meetings with Henning Heldt, Richard Weigand and other top officials. From mid-June until the end of August, 1976, Mr. Meisner held the position of National Secretary, a post immediately under the supervision of Weigand, the Deputy Guardian for Information in the United States. [See Appendix I.] In that position, Mr. Meisner had access to all the Guardian Offices files in Los Angeles and was one of only five individuals in the United States who had access to the most sensitive documents of the Church of Scientology.

THE CONSPIRACIES TO COMMIT BURGLARIES AND TO OBSTRUCT JUSTICE

In early 1974 Guardian Order 1361 (GO 1361) was issued by Guardian World Wide Jane Kember. GO 1361 called for an all-out attack on the Internal Revenue

Service[3] which was to include the filing of law suits, a public relations assault, as well as the actual infiltration of the IRS by agents of the Church. In order to implement that operation, the Guardian's Office in L.A. decided in the summer of 1974 that a member of the Church should be recruited and planted as an agent within the National Office of the IRS in Washington, D.C. Cindy Raymond, a member of the staff of the Deputy Guardian for Information, Mitchell Hermann, who was then responsible for covert activities in D.C., and Meisner were assigned the task of recruiting such an individual. They each interviewed persons for that post and discussed the results of these interviews. Eventually in the fall of 1974 Cindy Raymond informed Meisner and Hermann that she had recruited one Gerald Bennett Wolfe for the purpose of infiltrating the IRS, and that Wolfe would be coming to D.C. and applying for a clerk's position at IRS. By November 1974[4] Wolfe obtained a

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[3]The affiant has ascertained from officials of the Exempt Organizations Section of the IRS that it had, from time to time, withheld tax-exempt status from certain church subsidiaries, unsatisfied that they met relevant criteria.

[4]Meisner advised affiant that on November 1, 1974, Mitchell Hermann, and an emissary from the Deputy Guardian for Information in L.A. who used the pseudonym Don Alverzo surreptitiously entered the IRS building and placed a listening device in a conference room which they knew was about to be used for a high-level IRS meeting on the Church of Scientology. That meeting was to include among others, representatives of the Audit Section, the Exempt Organizations Section, and the Intelligence Division. Mitchell Hermann who overheard the conversation being bugged, told Meisner what he had overheard. Two or three months later Meisner read a transcript of the tape secretly produced. Meisner observed that transcript in the Information Bureau files then located at Fifield Manor. Meisner recalled for affiant that the transcript revealed a discussion of the need for communication

[footnote continued]

position as clerk-typist at IRS. Soon thereafter, Wolfe complained that he was unable to obtain some of the sought-after documents. In order to determine whether Wolfe was making excuses for his failures or that access to IRS files was difficult, Meisner and Hermann entered the IRS building during a weekday, went into an office in the Exempt Organization Branch and took a file relating to Scientology out of a filing cabinet. The file was taken out of the IRS building, xeroxed and returned by Hermann to the position from which it was taken the next morning.

In March 1975,[5] after Mitchell Hermann's departure from D.C., Meisner took over the supervision of all covert Scientology agents within government agencies. This included direct supervision of Wolfe's activities at IRS and on numerous occasions Meisner accompanied Wolfe into the IRS building after working hours for the purpose of breaking into offices and copying documents. Those activities included:

(1) From March to June 1975 several incursions, most by Wolfe alone and one jointly with Meisner, into the office of Lewis Hubbard, an attorney in the Chief

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between the various units of the IRS which were investigating the Church and a discussion of future plans for dealing with the Church. Independent investigation consisting of an interview with Joseph Tedesco, Director, Exempt Organizations Division of the IRS, confirms that there was such a meeting on November 1, 1974.

[5] From December 1974 to March 1975 Herman directed several burglaries of the offices of Barbara Bird, an attorney in the Refund Litigation Division of the Chief Counsel's office. Meisner was kept informed of the results of these burglaries by Hermann inasmuch as Meisner was the highest intelligence officer in the D.C. Scientology organization. [Bird was known to be involved in Scientology cases.]

Counsel's office[6] for the purpose of copying all records relating to the audit of the Hawaii Scientology organization. Upon receipt of the xeroxed documents, Meisner sent copies to the Los Angeles Guardian's Office where additional copies were distributed to Henning Heldt, Richard Weigand, Larry Rose—Deputy Legal Guardian until June 1975, Mary Heldt—Deputy Guardian for Finance, and Martin Greenburg—the CPA-US. These were marked "Confidential, GO 1361 Material". Subsequently, Meisner, while in the L.A. offices, observed these same documents with the above-described distribution list attached.

(2) In June 1975, after the Hawaiian organization's exemption was approved by IRS, an audit was begun of the California Scientology organization. Wolfe was instructed by Meisner to continue a weekly monitoring of all files in Lewis Hubbard's office.

(3) Beginning during the summer of 1975 Wolfe was directed by Meisner to monitor the files of the Exempt Organizations offices.

Among those whose files Wolfe reviewed and xeroxed were: Jeanne Gessay, Chief of Ruling Section One; Muriel Moritz who worked with Gessay; Assistant Commissioner Alvin Lurie; Deputy Assistant Commissioner Theodore Rademaker; Special Assistant to the Assistant Commissioner Charles Rumph; Technical Advisor Howard Schoenfeld; and Director Joseph Tedesco. These offices were checked by Wolfe on a

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[6]Independent investigation by representative of the United States Attorney's Office consisting of a conversation with Warren Bates, an Assistant Commissioner of the Internal Revenue Service has revealed that during 1975 one Lewis Hubbard was indeed an attorney in the Office of the Chief Counsel of the IRS.

weekly basis from the fall of 1975 until June 1976. On several of these occasions Meisner accompanied Wolfe.[7]

Another surreptitious entry into a government building occurred in July 1975 when Meisner instructed Wolfe to obtain all material relating to pending Scientology cases against IRS from the Tax Division of the Justice Department. To that end, Wolfe made approximately four visits to the Star Building in the District of Columbia[8]—a Justice Department Annex housing some of the Tax Division offices—copied approximately two inches of documents. All these documents were turned over by Wolfe to Meisner who filed copies in the D.C. Information office files and sent other copies to L.A.

In December, 1975 Cindy Raymond, the Collections Officer within the Deputy Guardian for Information, U.S. Office, developed a "program" calling for covert operations designed to obtain Interpol documents regarding the Church of Scientology contained in files held by government agencies.[9] That program was developed in

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[7]These represent only a few of the break-ins and surreptitious entries into the IRS building conducted by Meisner and Wolfe. In every instance copies of the documents obtained were filed in the D.C. Ass't Guardian Information office as well as sent to the Deputy Guardian for Information in Los Angeles. Assistant Commissioner Bates has confirmed that, in 1975, Gessay, Moritz, Lurie, Rademaker, Rumph, Schoenfeld and Tedesco did indeed hold the positions indicated by Meisner.

[8]Affiant has ascertained from Justice Department attorneys that the Star Building does indeed house offices of the Tax Division of the Department of Justice.

[9]Prior to the establishment of "Sea Organization" headquarters in Clearwater, Florida, this international policy-making arm of the Church was quartered in sea-going vessels which, from time to time, sought docking privileges in various ports. Frequently,

[footnote continued]

response to the general directive contained in Guardian Order [GO] 1634 composed and disseminated by the Guardian Office World-Wide. All documents not turned over to the Church by the government pursuant to an FOIA request were to be covertly obtained by agents of the Church, according to the Raymond program. That program was to be implemented in the District of Columbia either by burglarizing the targeted office or by placing a secure Scientology agent on the staff of the targeted government attorney. This agent would have access to the attorney's files and would xerox the sought-after documents and turn them over to Meisner, who supervised the activities of all Scientology covert agents in Washington, D.C.

In furtherance of that program, Meisner determined that he should place a Scientology agent within the office of Department of Justice Attorney Paul Figley who was then handling the Scientology Freedom of Information suit against Interpol. Meisner recruited one Sharon Thomas, a church member, and directed her to apply for a secretarial position within the Justice Department. She succeeded, initially as a secretary across the hall

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Mediterranean port authorities declined to extend such privileges, suspecting illicit activities on what were thought to be "mystery ships," since the Church disguised their true ownership. Church leaders thought Interpol, the international policy agency, to be responsible for these difficulties. As a result, Church leaders sought from Interpol documents in its possession critical of the Church. Initially, attempts were made to burglarize offices of Interpol maintained in the U.S. Treasury Department in Washington, D.C.

*Meisner states that before Thomas could be placed at the Justice Department he had to obtain approval in writing from Richard Weigand and Cindy Raymond. He sent to them requests in writing and they responded by telex.

from Figley's office and thereafter as Figley's personal secretary. As a result of Thomas' work, Meisner learned in February 1976 that the overwhelming majority of the sought-after Interpol documents were not in Figley's possession. Meisner learned that Assistant United States Attorney Nathan Dodell in the United States Attorney's Office in the District of Columbia, whose office was located on the third floor of the United States Courthouse within that District, was the Assistant U.S. Attornney primarily handling Freedom of Information Act cases involving the Church. However, during Thomas' association with Figley, she took material from Figley's files, as well as Interpol files, and delivered them to Meisner. Meisner recalls that, among these materials were documents relating to Scientology-instituted FOIA suits against, *inter alia,* the Central Intelligence Agency, the Drug Enforcement Administration, Customs, Interpol and the Defense Communications Agency. Meisner filed copies of all such documents in the Washington Information Bureau files and sent copies to the L.A. Information Bureau for filing, together with a summary cover memorandum. The originals were then returned by Thomas to the files in Figley's office.[10]

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[10]Independent investigation, consisting of interviews of Mr. Paul Figley by representatives of the United States Attorney's Office for the District of Columbia, has confirmed that one Sharon Thomas was indeed his secretary during 1976 and that he, Figley, was responsible for defense of FOIA suits brought by the Church and maintained appropriate files.

During the past week, Mr. Meisner, accompanied by representatives of the U.S. Attorney's Office for the District of Columbia, has visited Mr. Figley's office and inspected his files. Meisner identified files and specific documents which he recalled copying. A list of all such documents is appended to this affidavit, denominated "Description of Property." On at least one occasion during

[footnote continued]

Sometime in March 1976, Meisner and Wolfe entered the IRS building after hours using Wolfe's legitimate IRS credentials. Once inside, they broke into the room in which the equipment used to make identification cards was located and made themselves false identification cards using fictitious names. These credentials were initially made for use in a covert operation involving one Robert Snyder, a newscaster critical of the Church. However, when it became evident that the Interpol Freedom of Information documents were in AUSA Dodell's office, Meisner and his immediate superiors decided to use those credentials to enter the United States Courthouse in view of the tight security within that building.

On a weekday during the first week of May, 1976, Meisner and Wolfe entered the Courthouse building at approximately 4:00 p.m. Because the entry was prior to 6:00 p.m., neither had to sign-in in any book although they both had to show identification. Wolfe used his legitimate IRS identification card while Meisner showed a false IRS identification card in the name of J. M. Foster. They both proceeded to the third floor which houses the United States Attorney's Office as well as the District of Columbia Bar Association Library. Meisner and Wolfe went to the library and waited until

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the past week, Meisner was shown the outer cover of a confidential Defense Communications Agency file which he remembered having copied and was asked to describe its contents. He did so accurately.

*Prior to putting the plan of entering the U.S. Courthouse in effect, Meisner states that he discussed the whole matter with Cindy Raymond, who initiated the program, and Mitchell Hermann. He later kept them advised of his progress on a regular basis.

after working hours. They then began to wander around the floor in an attempt to locate the office of AUSA Nathan Dodell. Eventually the office was located in a small hallway connected to the back of the above-mentioned library by a door which was always left open. The Dodell office was separated from the rest of the U.S. Attorney's Office by a double door that remained closed. On the inside of that door is also located an elevator for court personnel, one of two used after working hours and on weekends.

Upon locating the office, Meisner and Wolfe attempted to open the door leading into AUSA Dodell's suite of offices with a metal device used in the past for that purpose. However, they met with no success.

Approximately two to three days later, Wolfe was sent back into the U.S. Courthouse during his lunch hour in order to find a means of entering AUSA Dodell's office and in particular to investigate the type of latch on the outer door. While there, Wolfe entered Dodell's office and found both Dodell and his secretary gone. On top of the secretary's desk was a set of keys. Wolfe took those keys, called Meisner to inform him of that find, then met with Meisner in front of the Courthouse to show him the keys. Meisner and Wolfe had four of those keys, which resembled the type used in government buildings, duplicated at a locksmith on Columbia Road, N.W., between 18th and Champlain Streets, N.W. Then Meisner and Wolfe returned to the Courthouse and dropped the keys in the corridor outside Dodell's office, expecting that when found Dodell's secretary would assume they fell out of her purse.

On May 21, 1976, Meisner met Wolfe at approximately 7:00 p.m. outside the IRS building in the District of Columbia and drove in his car to the U.S. Courthouse.

That evening Wolfe signed-in using his own IRS identification card and Meisner signed-in as J. M. Foster using his false IRS credentials. They were permitted to sign-in after the guard had called the D.C. Bar Librarian and obtained permission from him to allow Meisner and Wolfe to use the library. They then obtained from the government guard at the building's entrance a key to one of the after-hours elevators.

Meisner and Wolfe proceeded to the third floor using the elevator next to Dodell's office, then went into the D.C. Bar Library through the back entrance, and signed-in on the library log as J. Wolfe and J. M. Meisner.[11] Ten minutes later they went to Dodell's office through the back of the library and, after trying the keys they had duplicated, they found the one that opened the door. That door opened into a small room—the secretary's office—which in turn led through an open door to Dodell's office. Upon entering Dodell's office they proceeded to review three drawers full of various types of files maintained in the course of FOIA ligitation instituted by the Church.

After skimming through these files, they located the sought-after Interpol file as well as a general file on Scientology violations, and some Scientology files containing documents obtained from the D.C. Police Department. Meisner and Wolfe placed some ten to twelve files in their respective briefcases and went back through the library, then into the main third-floor hallway to the xerox machines of the United States

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[11] This is corroborated by the D.C. Bar Library sign-in logs as well as by the admission of Gerald Wolfe at the time he plead guilty on May 13, 1977.

Attorney's Office. Over the next two hours they xeroxed a five-inch stack of documents which they had obtained from AUSA Nathan Dodell's office. They then returned these files back to Dodell's office and left the Courthouse sometime around 11:00 p.m. Meisner drove Wolfe to his car and agreed to return to the Courthouse and Dodell's office on May 28. He then went on to his office at the Church at 2125 S Street, N.W. and placed the xeroxed documents there. He then called Los Angeles and reported to Richard Wiegand, Deputy Guardian for Information (intelligence) in the U.S., that he had obtained the Interpol file. Weigand had been involved in the preparation of that covert operation. Over the next few days, Meisner reviewed these documents and sent them to his superiors with cover memos explaining their content. Each memo was signed "Mike" by him. Copies of these documents with cover memoranda were sent by Meisner to:

1. The Deputy Guardian-Information Office, U.S. in Los Angeles, in the person of Mitchell Hermann who was the Secretary for the Southeast Area which included the District of Columbia with the understanding that he would forward a copy to the Deputy Guardian-Information Office, World Wide in East Grinstead, Sussex, England.
2. Mary Sue Hubbard, the second person in command of the Church and the highest authority in the Guardian's Office, in Clearwater, Florida.

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[12] Investigation by the Federal Bureau of Investigation at the Church of Scientology in the District of Columbia has confirmed that Meisner held such a position at the time in question. This investigation was conducted subsequent to the event of June 11, 1976, while Meisner was a fugitive.

One copy was retained in the office of the Assistant Guardian for Information in the District of Columbia, located on the fourth floor of 2125 S Street, N.W.[12]

On Friday, May 28, 1976, Meisner met Wolfe once again in the parking lot behind the IRS building after working hours and they proceeded to the U.S. Courthouse. Wolfe signed-in at the guard's desk using the name of "Haack" or "Hoake", showing an identification card which he had borrowed from a fellow-employee at IRS. Meisner signed-in as J. M. Foster, again using his false IRS credentials. Once again they obtained from the guard an elevator key and signed for it.[13]

Meisner and Wolfe proceeded to the third floor using the same elevator used the first time and went directly to AUSA Dodell's iffuce. Once again Meisner and Wolfe filled their briefcases with scientology files from Dodell's filing cabinets. They then went through the United States Attorney's Office hallways to the area where the xerox machines were located. This time Meisner and Wolfe each used one xerox machine and for the next one and one-half hours proceeded to copy a stack of documents slightly larger than the five-inch one of May 21. They then returned through the D.C. Bar Library intending to re-enter AUSA Dodell's office through the back of the library. They were, however, stopped by the librarian who wanted to know why they had failed to sign-in. When he apparently failed to receive an adequate response he went to call a building guard. Meisner and Wolfe took advantage of the librar-

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[13]This is corroborated by the Courthouse sign-in logs for May 28, 1976, which show that at 7:30 p.m. one "Haack" and a J. M. Foster signed-in, noting that they were going to the D.C. Bar Library. They signed out at 9:55 p.m. It is also confirmed by Wolfe's acknowledgment in open court at the time of his plea.

ian's temporary disappearance and returned to Dodell's office to return the files they had taken to their lawful place. As they were preparing to leave the third floor, Meisner and Wolfe were confronted by a building guard who informed them that they could not use the U.S. Attorney's Office xerox machine, the guard also directed them to print their names on a piece of paper.[14]

Following his evaluation of the documents obtained from AUSA Dodell's office on May 28, Meisner determined that one more covert entry would be necessary to complete copying the remaining scientology-related documents. Meisner was also instructed by Mitchell Hermann that on the next entry into AUSA Dodell's office he was to obtain any personal information about Dodell which he could find. The purpose for that information, Meisner was told by Hermann, was to implement a Church operation which had been instituted to remove Dodell from his governmental position because he was considered a threat to the Church.

On June 11, 1976, Meisner once again met Wolfe at the IRS parking lot, parked his own car, and drove to the U.S. Courthouse in Wolfe's car. The latter's car was parked across the street from the only open entrance in the evening—on John Marshall Place. This time Wolfe signed-in at the guard's desk as Thomas Blake and Meisner as John M. Foster. Both used the false credentials they had made during their IRS break-in. They also once again obtained an elevator key.[15] This time,

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[14]The Federal Bureau of Investigation has confirmed these events through interviews of the D.C. Bar Library evening librarian as well as the building guard.

[15]Wolfe acknowledged these events at the time of his plea in U.S. District Court, as well as in testimony before a United States Grand Jury.

however, the building guard inspected more closely the identification presented by Meisner and Wolfe inasmuch as he recognized them as the two individuals involved in the May 28 incident. Moreover, the building guard had, during the intervening two weeks, reported the May 28 incident to the U.S. Attorney's Office and the Federal Bureau of Investigation had been called to look in to the matter. Meisner states that he and Wolfe then proceeded to the third floor using an elevator on the opposite side of the building from the one they had used on the two previous occasions. Upon entering the library, Meisner showed the night librarian a written authorization to use the library which he had earlier received from the day librarian. Meisner and Wolfe then had to wait approximately twenty minutes while a cleaning lady completed working in AUSA Dodell's office. As they were waiting, two FBI agents who had been alerted by the building guard about the presence of Meisner and Wolfe arrived and aborted the planned burglary of Dodell's office. FBI Special Agents Dan G. Hodges and Christine Hansen questioned Meisner and, upon being told that he as not employed by the IRS, seized his credentials in the name of John M. Foster. The agents confirmed the employment of a Thomas Blake at the IRS. Wolfe, thus, was permitted to retain his card in Blake's name. Meisner and Wolfe were then permitted to leave the building.

Meisner stated that he and Wolfe proceeded down the staircase to the first floor and, after giving up their elevator key, left the building. They then proceeded to take a circuitous route on foot in order to shake any potential pursuer. When assured that they were not being followed, they took a taxicab to Billy Martin's Tavern at the Southwest corner of Wisconsin and N Street, N.W. Once there, Meisner placed a telephone call to Mitchell Hermann at the Guardian's Office in Los Angeles and

informed him in a cryptic manner that a major development which required urgent action had occurred. Meisner was given the number of an outside phone to call and he placed the call a few minutes later. During that second call he told Hermann what had just occurred. Hermann directed Meisner to wait and call back within one hour inasmuch as he, Hermann, had to consult Richard Weigand, the Deputy Guardian for Information. Hermann also instructed Meisner and Wolfe to begin writing a narrative of the circumstances leading to their confrontation with the FBI. Meisner informed Wolfe of these instructions and then called the Church of Scientology at 2125 S Street, N.W., and spoke to Bruce Ullman, his deputy who was in charge of internal security, and Joseph Alesi, another deputy in the Information Bureau. Meisner told them about the developments and instructed Alesi to come to the restaurant. Both Ullman and Alesi were cognizant of the plans to penetrate Dodell's office.

When Alesi arrived at the restaurant he was directed by Meisner to go back to the U.S. Courthouse and pick up Wolfe's car. Meisner also instructed Alesi to contact his wife and have her pick up Meisner's car at the IRS and bring it to Georgetown. Meisner then called back Hermann in Los Angeles and was told that Weigand wanted him in L.A. for debriefing the next morning. Meisner also directed Ullman to bring him money from the D.C. Church the next morning at the Quality Inn Motel at 1190 North Courthouse Road in Arlington, Virginia. Meisner then went there with his wife, Patricia, and stayed there overnight.[16]

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[16]Motel records indicate that one "Pat Meisner" rented a room on June 11, 1976 for one night and that the room was vacated on June 21 at 8:31 a.m.

Meisner states that on June 12, at approximately 8:30 a.m., he was driven to National Airport where he took a United Airlines flight to Los Angeles under a fictitious name, paying for the ticket with the cash brought to him by Ullman. Upon his arrival in L.A., Meisner went to the Church's Guardian Office headquarters at Fifield Manor, 5930 Franklin Avenue, Hollywood, California, where he was taken to Weigand's office to type out the report he had been directed to prepare about the Courthouse incident. That report was read by Weigand and his deputy Greg Willardson in Meisner's presence. It was then taken to Henning Heldt, the Deputy Guardian for the United States—the highest officer of the Church in the United States. Meisner then met with Weigand and Willardson to determine how to handle the Courthouse break-ins and any ensuing Federal Bureau of Investigation action. Two proposals were considered. One involved sending Wolfe to the District of Columbia with a prepared cover-up story as to why he was in the Courthouse in order to see what the authorities would do. Under that plan Meisner would be sent to D.C. after legal action was completed with Wolfe. Meisner would also be instructed on what to say. Neither would admit any association with the Church of Scientology nor acknowledge having broken into AUSA Dodell's office. The second plan revolve round sending both Meisner and Wolfe to D.C. at the same time and let them both accept whatever punishment was meted out, again always denying any association with the Church. After these two plans were discussed at length, Meisner was told by Weigand to stay at the Holiday Inn in Hollywood. It was also decided to summon Wolfe to L.A. immediately. Meisner received money for that purpose from Peeter Alvet, the Information Bureau Establishment Officer—the individual who handles financial matters for the

Information Bureau. That meeting concluded at approximately 7:00 p.m. and Meisner went to the Holiday Inn where he signed in under a fictitious name.

The next day, June 13, at approximately 10:30 a.m., Weigand, Willardson and Meisner met with Henning Heldt and his deputy Duke Snider at Fifield Manor. Both plans were outlined to Heldt in Meisner's presence. Heldt tentatively rejected both plans and directed Weigand, Willardson and Meisner to consider a third plan—not sending either Meisner or Wolfe back to D.C. on the theort that, with no bodies present, the Government's investigation into the Courthouse incident would flounder. Heldt stated in no uncertain terms that no plans, including a cover-up story, were to be executed without his specific approval. Weigand, Willardson and Meisner returned to Weigand's office to continue their strategy meeting. It was decided that plan one, which involved sending Wolfe to D.C. first and later sending Meisner, should be recommended to Heldt. During those discussions, the outlines of a cover-up story which Wolfe and Meisner were to give the FBI and any grand jury were also discussed and approved for recommendation to Heldt. Weigand wrote the proposal and the cover-up stories in longhand and gave it to his secretary Janet Finn, who then typed it. While the document was being typed, Mitchell Hermann, who had participated in some of the discussions and was being kept briefed on the developments, came into the meeting and informed those present that Wolfe was enroute to L.A. Meisner personally read the document, then Weigand stated that he would take it to Heldt for his approval. Within one-half hour Weigand returned and told Willardson and Meisner that Heldt and Snider had approved the plan. The plan as approved required preparing a detailed

cover-up story for Wolfe and Meisner. Wolfe would be initially sent back to the District of Columbia where, if investigated or apprehended, he would tell his cover story and stick by it through all legal proceedings. Wolfe would feedback to the Church officials in L.A. what was happening in D.C. Once these proceedings were completed, Meisner would be sent back to D.C. with his parallel cover story. Mitchell Hermann was to return to D.C. with Wolfe and serve as his Church contact during the course of any investigation or legal proceedings. The meeting then terminated with the understanding that more meetings would be held the next day after Meisner changed his appearance.

On Monday, June 14, Janet Finn visited Meisner at the Holiday Inn, cut and dyed his hair and gave him money to buy contact lenses to replace his eyeglasses. Meisner also shaved his moustache. Thus it was hoped that if a warrant was issued for hiss arrent, he would be able to evade the authorities. Meisner then went to an optometrist and purchased contact lenses.[17]

At approximately 2:00 p.m., Wolfe arrived with Weigand and Willardson at Meisner's hotel room and the cover stories were developed. Then all the participants proceeded to drill Wolfe on the specifics to make sure he could stick by it. It was also agreed that Wolfe should be given an attorney upon his arrival in D.C. and Mitchell Hermann was directed to find an attorney who would be sufficiently reliable to go along with the cover story created by the Church. Wolfe was also directed to call his superiors at IRS to inform them that he would not

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[17]Dr. Gerald Nankin of 6611½ Hollywood Boulevard, Hollywood, California, has supporting documents which confirm that Mr. Meisner was at his office for the stated purpose.

be in the next day and at the same time find out if the FBI had been inquiring about him.

If questioned in D.C., Wolfe was to state that he had accidentally met Meisner, whom he only knew as John Foster, at a local bar and struck up a conversation. He was to add that Foster was a law student and that he became interested in Foster in the hope that Foster would teach him legal research so that he, Wolfe, could obtain a better-paying job. Wolfe was to say that he and Foster met on some three or four occasions always setting up meetings from week to week. Then one evening Wolfe and Foster had met in Georgetown and had become inebriated; that they had gone to visit the IRS building while drunk; once there they had found the identification room unlocked; and that they made identification cards as a lark. Then Wolfe was to meet Foster on three occasions to be given legal research lessons, that on each occasion they went to the D.C. Bar Library in the U.S. Couethouse to use law books, and that they used their respective false identification cards go gain access to the library facilities. Meisner's cover story was to run along the same lines as Wolfe's story. He was to tell authorities that he had never told his real name to Wolfe and that Wolfe was to assist him in research about the exempt organization statutes of IRS. Meisner was to confirm that at no time was Wolfe a church member.

In furtherance of the plans agreed upon in L.A. on June 12-14, Wolfe was returned to D.C. where he was arrested by the FBI.[18] Meisner states that he was

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[18]Records of the Office of the United States Attorney for the District of Columbia indicate that Wolfe was offered a plea to a misdemeanor with six months maximum jail exposure in return

[footnote continued]

informed by L.A. church officials that Wolfe, following his testimony went to the Church offices in D.C. where he was debriefed concerning his Grand Jury testimony. On Tuesday, June 14, 1977, approximately four days after Wolfe's Grand Jury appearance, Meisner read in L.A. a 15-page synopsis of Wolfe'e testimony before that Grand Jury.*

After June 14, 1976, Meisner was named National Secretary of the Church of Scientology and maintained an office at the Guardian's Office in L.A. However, when the Church discovered that a warrant had been issued for his arrest in D.C., he was removed from any official position with the Church, while retaining functions in an unofficial capacity. This situation continued until sometime in April 1977 when Meisner indicated that he was tired of waiting and wished to be sent back to D.C. as soon as possible. When Meisner threatened to take the situation in his own hands, he was placed under twenty-four-hour guard and was repeatedly "audited"[19] by the Church. On one occasion he was

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for his cooperation. However, hre rejected that offer and chose to plead guilty to the false use of a government seal (18 U.S.C. § 1017)—a felony carrying a five-year maximum jail sentence. Then on June 10, 1977, following his sentencing, Wolfe was subpoenaed before a District Court grand jury where he testified under oath to the exact same facts prepared for him on June 12-14, 1976 in L.A.

*Within the Information Bureau U.S., Meisner was known under the code name "Herbert" and Wolfe was known under the code name "Silver". The two code names had additional meanings: "Silver" also meant the Internal Revenue Service, and "Herbert" meant the situation in Washington which arose out of the June 11, 1976 incident. Files on both code names are maintained in the Information Bureau files in Los Angeles.

[19]"Auditing" is a process designed to effect mind-control; its use dates back to the founding of the Church and is essential to the indoctrination of all would-be Scientologists.

removed from one building to another handcuffed and gagged. On another he was apprehended by church members in Las Vegas and returned under their custody to Los Angeles where he was again placed under house arrest. It was explained to him that this action was taken in his own interest and the interest of Scientology and that in due time he would be returned to his position of responsibility within the Church. Throughout that time no attempt was made to close off from him channels of informationa bout the Church's activities and indeed his advice was often sought. This is evidenced by the fact that as late as June 14, 1977, he was given the memorandum on the debriefing of Wolfe after his Grand Jury appearance. However, on June 20, 1977, Meisner contacted the United States Attorney's Fraud Division and stated that he had escaped from the Church and wished to come to the District of Columbia, face criminal charges, and cooperate in the on-going investigation of the burglaries of the offices of the United States Attorney.[20]

POSTURE AND LOCATION OF DOCUMENT FILE MAINTAINED BY THE CHURCH OF SCIENTOLOGY

Michael Meisner has advised affiant that the guardians' offices and their operational and administrative bureaus in the Church of Scientology have maintained files containing documents reflecting all activities of the Church and all external references to the Church since

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[20]Meisner has been represented by counsel since his arrival in Washington on June 21, 1977. He has been granted no immunity from prosecution and understands that immunity will not be offered him by the Government. Meisner has agreed to enter a plea of guilty to a felony carrying a maximum term of imprisonment of five years.

the inception of the Guardian's Office in 1966. Meisner explained that these files are kept both to facilitate operations of this large organization which experiences significant personnel fluctuation and also to provide a permanent history of matters touching upon the Church. Meisner stated that he has personally observed, both in Washington, D.C. and Los Angeles, California, documents carefully filed and indexed which reflect activities of years ago. Meisner advised affiant that a fundamental principle about which all Church staff personnel are well trained is that recordation and retention of records is essential to an on-going "memory bank" which, in turn, is essential to Church operation and security.

Meisner has told affiant that the primary depository of documents for Scientology in the United States is the Information Bureau in Los Angeles, California. The documents were accumulated by FOIA actions and covert Scientology operations against various United States agencies; those documents gathered through legitimate, non-covert channels are marked "FOI" and those obtained by covert actions are marked "non-FOI." (The distinction is noted so that Church officials can be certain which documents can safely by disclosed for public purposes.) Covertly obtained documents are those obtained either through outright burglaries or theft by Scientology agents who work for government agencies. Most of those covertly obtained during the period 1975-76 in the Department of Justice are accompanied by a cover memorandum (which can be identified by the signature "Mike") from Michael Meisner, describing the attached document. Some documents covertly obtained prior to March 1975 are accompanied by a memorandum from Mitchel Hermann, signed "Mitch."

The Information Bureau documentary material is divided into six file systems:

(a) two file systems consisting of covertly and overtly obtained documents which deal with individuals and groups. These two categories, which together constitute the main Information Bureau files, are filed alphabetically in approxmately 250 file cabinets.

(b) Another category of files is called the "government special bank" which includes only those documents the majority of which are "non-FOI" obtained from the government. Some of the files contained in the "individual" and "group" filing cabinets would also be in the "government special bank" if they were obtained from the government. The "government bank files" are contained in approximately ten filing cabinets of four to five drawers each.

(c) In addition to the three files described above to which rather free access is permitted, two files of strictly limited access are maintained:

(1) The "program files" which are maintained by the Programs Officer and are available to only ten people—among them were the Deputy Guardian for Information, his deputy, the five area secretaries, and the National Secretary. These are always kept in the office of the Programs Officer. These "programs" are high level policy directives written by the staff of the World-Wide or United States Guardian Officer and approved by Guardian World-Wide. A program outlines a plan of action which is to be accomplished and then lists the individual steps which are to be taken to accomplish it. Most programs are multi-bureau in nature and therefore are supervised by the Deputy Guardian's Office itself. All activities in the Guardian's Office are conducted

pursuant to "programs"; immediate access to these files is absolutely essential to the daily operations since no orders can be issued without them.

(2) The operations files, which contain all reports prepared to implement an operations activity. "Operations" are covert activities directed against "enemies" of Scientology. The operations files include all reports which discuss the information gathered from an operation and the results of the operation. When these reports of operations are placed in the individual or group files they are purged of any information potentially incriminatory of the Church of Scientology. The operation files are accessible only to five people—the Deputy Guardian for Information, his deputy, the National Secretary, the National Operations Officer and the National Branch I Director; these files are always kept in the Offices of the National Operations Officer.

(d) The confidential file of the Deputy Guardian for Information (U.S.) which contains documents of extreme sensitivity. Direct access to this file is limited to the Deputy Guardian for Information and his secretary. These highly sensitive documents are primarily of an organic nature, such as Guardian Orders and programs written by L. Ron Hubbard. It also includes reports written by the Central Intelligence Agency in South America (in particular Ecuador and Bolivia) concerning Interpol agents believed to be involved in drug dealings. Those documents were obtained from Nancy Douglas, a Scientology agent who had obtained employment at the Drug Enforcement Administration. She, in turn, gave them to Meisner, her contact, who sent them with a cover memo to Mitchell Hermann the Southeast U.S. Secretary in Los Angeles.

These files are maintained in a safe and a file cabinet which are always kept in the office of the Deputy Guardian for Information, Greg Willardson at the Cedars/ Sinai complex.

During the summer of 1976, after the District of Columbia U.S. Courthouse entries had been detected, Meisner was sent to Los Angeles and given the position of National Secretary for Information. In the course of those duties he read materials taken from virtually all United States Guardian Office Information Bureau files.

In July, 1976 Meisner approached Peggy Tyson (the Information Programs Office U.S.) and asked her for all programs related to his position as National Secretary. Tyson opened her program files file cabinet (located directly next to her desk) and pulled out about two feet of file folders.

At this time the U.S. Information Bureau was located in Glendale, California on Cerritos Street.

The file folders he was given included some programs directed against governmental agencies: GO 1361 (IRS), Snow White, GO 1300 (Coast Guard), GO 1634 (FOI actions), GO 163440 (Information Bureau activities re FOI), and others.

Tyson was known to Meisner for some time as the Information Programs Officer. In February, 1976, he was in Los Angeles for a period of about three weeks. During that time he spoke with Tyson 3-4 times about the Information Bureau DC's progress on various programs. In February, 1976 Tyson again had her program files (which she referred to during their conversation) next to her desk. At this time her office was located at Fifield Manor in Hollywood, California, on the 7th floor.

In July, 1976 when Tyson first moved into the Glendale office she had her desk positioned near the front door. She remained in this position only for about a week before moving her desk to the rear of the building. This first week she also had her program files directly next to her desk. Thus, every time he has seen Tyson's office area he has noted that she keeps her program files directly next to her desk.

To the best of Meisner's recollection, her file cabinet is light grey with a pushbutton lock in the top right hand corner of the cabinet.

Meisner recalls first seeing the Operations file cabinet in the summer of 1975. At that time the cabinet was in an office on the 7th floor of Fifield Manor in Hollywood. This office was shared by Bruce Raymond (Operations Officer US) and Gary Lawrence (Deputy Operations Officer US). At that time, Lawrence pulled from the Operations files the files pertaining to the American Medical Association and Council of Better Business Bureaus Operations.

In February of 1976 the Operations file cabinet was located in a different office on the 7th floor of Fifield Manor, but again, next to Bruce Raymond's desk. At this time Meisner trained Bruce Raymond on the theory of operations and they referred to various operations files during the drilling.

When the Information Bureau was moved to Glendale in July, 1976, Bruce Raymond again located the Operations file cabinet directly next to his desk. Meisner referred to these files about once every week or two over the summer of 1976 in the regular course of Scientology duties. Every time he has entered Bruce Raymond's office he has observed that the Operations file cabinet, secured by a bar lock, was located next to his desk.

In the summer of 1975 the Government Special Bank was maintained in a small alcove between the DG Info's Office and the office of the CIC section, on the 7th floor of Fifield Manor in Hollywood. At that time it consisted of about four file cabinets. Meisner had reasons to check these files for some information on the IRS. John Lake was responsible for the upkeep of these files and had his desk located next to the alcove in which they were stored.

In February, 1976 the Government Special Bank was still located in this alcove. He was required to pull all files related to the Postal Service from the Government Special Bank.

In the summer of 1976 the Government Special Bank was located in the Information Bureau Offices in Glendale and consisted of about 10 file cabinets (grey, with pushbutton locks) located near the center of the warehouse-office in Glendale. Meisner consulted these files 2-3 times a week through the summer of 1976.

The Deputy Guardina for Information (U.S.) retained all documents that he considered of extreme sensitivity, in a safe and safe-file cabinet in his office.

In February, 1976 Meisner was ordered to go over "operations" theory with Bruce Raymond and drill him so that he understood it and could apply it. It was necessary for him to use two sensitive Guardian Orders (GO's) written by L. Ron Hubbard. These GO's were kept in the Deputy Guardian for Information's safe-file cabinet. Dick Weigand (the Deputy Guardian of Information) told his secretary, Janet Finn, to open the safe file cabinet and give Meisner the GO's, which she did. The safe-file cabinet was located at that time in a small closet next to Janet Finn's office and Dick Weigand's office, on the 7th floor of Fifield Manor in Hollywood.

Several hours later, Meisner returned the GO's to Janet Finn and watched her replace them in the safe-file cabinet.

In July, 1976 he was again required to go over these GO's and requested permission of Dick Weigand to view them. At this time the safe-file cabinet was located in one corner of Dick Weigand's office in Glendale, California. Finn opened the cabinet and gave Meisner the GO's.

Near the end of August, 1976, Meisner required access to some reports by the CIA dealing with Interpol. These reports were contained in a small cube safe located in a corner of Dick Weigand's office. Meisner obtained Weigand's permission to have access to these documents and he instructed Janet Finn to open the safe. Meisner watched as she opened it and noted that the inside contained no file folders, but simply loose documents. She took out about 4-5 inches of CIA reports and gave them to him. Meisner retained these documents for about two days and then returned them to Finn and watched as she replaced them in the safe.

Access to the safe and safe-file cabinet was limited to Weigand and Finn. When Meisner first requested access to the CIA documents, Finn and Weigand were unavailable. He spoke with Greg Willardson (Weigand's Deputy), who told him that only Finn and Weigand had the combinations to the safes and he would have to get Weigand's express permission to obtain any materials from the safes. From his observation, the safe and safe-file cabinet were always kept within the D.C. Info's Office.

In January 1977 Meisner was told by David Moore about the impending purchase of the Cedars-Sinai hospital complex near Sunset and Vermont in Hollywood.

Moore told him that when the purchase was complete the Information Bureau would probably be the first Scientology section to move in as their present quarters were far more desirable. Moore said that the Information Bureau would be moved into a large suite of offices immediately behind the big reception area located in the middle of the building on the first floor. Moore said that entrance into this suite of offices was to be gained through one door off the reception area.

Around February, 1977 the purchase was announced and was carried on all the local TV news channels.[21]

During March, 1977 Meisner was told by three different individuals, at different times, that the Information Bureau had moved into the Cedars complex. These individuals were David Moore (an auditor, and Information Bureau student), Brian Andrus (then Southeast U.S. Secretary), and Cindy Raymond (then Acting National Secretary). On this occasion, Moore also told Meisner about a security problem in relation to the Information Bureau because access to the Bureau could be gained through the boiler room.

As previously indicated, Information Bureau files are the memory of the organization and essential to the continuing activities of the Information Bureau. In all Information Bureaus that he has visited, the files were never separated from the personnel. It is noteworthy that when the Information Bureau felt that the files had

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[21] Independent investigation conducted by Special Agents of the Federal Bureau of Investigation in Los Angeles over the past several days, consisting of physical observation, confirms that the Church of Scientology occupies the old Cedars of Lebanon Hospital and prominently displays its name at all corners of the property.

to be moved out of GO Headquarters in the summer of 1976, not only were files personnel moved out with the files, but all Information personnel followed the files, particularly the individual, group and government special bank—indicating the necessity for being near the files on the part of all Information personnel.

When he was told that the Information Bureau had moved into Cedars, it was clear to him that the main files had also been moved into Cedars. This was later confirmed.

About April 10, 1977 (at the beginning of Meisner's being placed under guard), Meisner spoke with John Lake who was the Director of CIC and responsible for the files. In a casual conversation about many things (Lake and he had been friends and co-workers in Scientology since 1971), they talked about Lake's job and he told Meisner how it was much easier moving the files this time as it was better organized. Lake stated that all the files had been moved into Cedars; that there was a great deal more room for all concerned and for the files section in particular; that the files were spread over several rooms; that some of the files had been put in small cubicles off the hallways but there was some problem with the building codes and having the cabinets in those cubicles.

From about the beginning of June, 1977 until June 20th, when Meisner left Los Angeles, one of Meisner's daily guards was Chuck Reese—an Information Bureau employee working in CIC, the files section.

On a number of occasions Reese, who was aware of the fact that Meisner knew the Information Bureau files and personnel had moved into the Cedars building, would talk about his work in the files; how boring it was; that he had considered getting a house closer to Cedars; and

how it was much nicer working in Cedars than in a warehouse. He told Meisner explicitly many times that the Information Bureau files were in the Cedars building.

The last time Meisner spoke with Reese was on Sunday afternoon, June 19. At that time Reese again stated that the files were in Cedars and that the filing was becoming quite backlogged.

Reese also explained that the Information Bureau was the only group present in the Cedars building and that other GO Bureaus or Scientology organizations would not move in for at least a couple of months.

The operations, programs, and sensitive files were always kept within the possession of the Operations Officer National, Programs Officer, and Deputy Guardian Information, respectively. Those files were considered as essential to those individuals as the main files were essential to the GO as a whole. Meisner was told specifically by David Moore and Brian Andrus in March, 1977 that the Deputy Guardian Information's Office in Cedars was a nice-looking, almost luxurious office. Cindy Raymond, likewise, told Meisner that Bruce Raymond (Operations Officer), Peggy Tyson (Programs Officer) and other specific individuals were able to have separate offices due to the large amount of room in Cedars.

The Deputy Guardian U.S.' office, located on the sixth floor of the Fifield Manor, contains copies of all program files from the various GO Bureaus. The Deputy DGUS is charged with the responsibility of administering those programs and delegates most of the responsibility to the Programs Officer U.S. The primary officials are:

Deputy Guardian U.S.—Henning Heldt and

Deputy DGUS—Duke Snider

Programs Officer U.S.—Betsy Hirsch (as of August, 1976)

In February, 1976 Meisner was in Duke Snider's office and was speaking to Snider about how he liked being responsible for programs, as opposed to more active roles he had played in the past. At the time, Snider was looking through program files that he had taken from a file cabinet near his desk.

In July, 1976 the Deputy Guardian U.S. program files, along with the program files of the other GO Bureaus, were moved into the Information Bureau office in Glendale. The move resulted from fears that due to the sensitive nature of the files and possible government interest resulting from a Customs seizure of mail matter, the files would be too accessible to the government if they remained in GO headquarters.

Meisner learned that the files moved were the program files from the Deputy Guardian U.S. and other offices from Judy Taussig, the Security Officer in the U.S. Information Bureau. It was through Taussig that the files had been moved to the Information Bureau offices.

Meisner also knew that these were the Deputy Guardian U.S.' programs files because of the frequent requests from persons in the Deputy Guardian U.S. office for various files from the cabinets. While the Information Bureau had an outside office in Glendale, courier runs were set up to deliver written communications between the Information Bureaus and Fifield Manor. Non-Information Bureau personnel were not allowed in the Information Bureau office, so that every time a file was needed from the Deputy Guardian U.S. program files, a note had to be sent with the courier that identified the file needed. The courier then had to search through the program files, find the correct file, and bring it back to Fifield Manor. Meisner heard the courier, Chris Mixer, complain often about the large number of requests from the Deputy Guardian U.S.' office for program files.

In late August, 1976, Meisner was told by Judy Taussig that these program files had been returned to the offices on the sixth floor to the Deputy Guardian U.S. and other Bureau offices at Fifield Manor. This was in response to his asking her what had happened to them as they were obviously missing from their location in the Information Bureau.

At this point (August, 1976), then, the Deputy Guardian U.S. program files were in the offices of Hennig Heldt, the Deputy Guardian, U.S. located in Fifield Manor, in Hollywood, California. The Deputy Guardian U.S.' offices have remained in Fifield Manor to this date, Meisner having been told by Church officials as late as mid-June of this year that any further moves into Cedars were at least two months away.

With respect to the files maintained in the headquarters of the Founding Church of Scientology located in Washington, D.C., Meisner has advised affiant that documents similar to those maintained in files in Los Angeles are filed in the Offices of the Information Bureau, D.C. Indeed, since many of the government agency documents maintained in Los Angeles were acquired through the efforts of D.C. operatives, and since copies were always retained in the D.C. Bureau, copies of the self-same documents are filed in both locations.

The filing system differs in that there is no distinction between group-related documents, individual-related documents and government documents. Rather, all documents are filed alphabetically, by agency.[22] Meisner

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[22]The agencies represented in these files include the exempt organizations and international operations divisions of the Internal Revenue Service, the Tax Division of the Department of Justice, the United States Attorney's Office for the District of Columbia,

[footnote continued]

states that all the government documents thus filed are the product of covert operations with the exception of two packets of materials which, together, comprise a stack of documents no more than one-inch high. These two packets consist of Department of Justice bulletins relative to the terms of the F.O.I.A. prepared for distribution to the public and a small collection of air-grams which the Department of State produced pursuant to an F.O.I.A. request (this latter collection is filed under a cover memo authorized by Meisner describing the means of its acquisition).

Meisner advised that these files are maintained in approximately ten file cabinets in the Church Offices at 2125 S Street, N.W., Washington, D.C. The Washington copies of the program files maintained by the Information Bureau, D.C., on the other hand, take up but a single file drawer; the operations files occupy two drawers.

Meisner advises that in late June, 1976, Mitchell Hermann told Meisner that all of the above files had been moved from 2125 S Street, N.W. to an apartment shared by Jay Armstrong and Patty Pease (two staff members, Information Bureau, D.C.) on California Street, N.W., shortly after Meisner and Wolfe had been confronted by the FBI agents in the Courthouse. After one week, Meisner was told, the files were moved to a house rented by Bruce Ullman and Joseph Alesi (Information Bureau, D.C. staffers).

In February, 1977, Brian Andrus became Southeast Secretary of the Information Bureau U.S. As such part

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the Coast Guard, the Drug Enforcement Administration and the Central Intelligence Agency. Individual files are maintained on Mr. Tedesco, of the IRS, Mr. Figley of the Department of Justice and Mr. Dodell of the U.S. Attorney's Office.

of his responsibility was to oversee the situation in Washington arising out of the confrontation of Wolfe and Meisner by the FBI on June 11, 1976. In this capacity Andrus met weekly from February to June, 1977 with Meisner much the same as Meisner had earlier met with Wolfe on a weekly basis in Washington to discuss their work together. These conversations with Andrus were of a general nature and often included discussions about the Information Bureau in Washington. In late March, 1977, during one of these conversations Meisner asked Andrus whether Washington was still maintaining two Information Bureau offices, whether the files were still in the house with Alesi and Ullman. Meisner was informed that the files had been returned to the office of the Assistant Guardian for Information at 2125 S Street, N.W. Inasmuch as Andrus was Southeast Secretary of the U.S. Information Bureau he had to know of this move because only he could have ordered it.

Meisner has told affiant that, within 2125 S Street, N.W., the Assistant Guardian's suite of offices is located on the fourth floor, rear, access to which is gained by a separate staircase. Within this suite of offices are offices of the Information Bureau, D.C. The approximately ten file cabinets are kept within these offices of the Information Bureau.

Based on the foregoing, affiant submits that there is probable cause to believe that, from 1974 through 1976, officials of the Church of Scientology in Los Angeles, California and in Washington, D.C., conspired to steal documents from the Government of the United States by means of the burglary of U.S. Government offices and theft by operatives of the Church in the employ of the U.S. Government; that documents belonging to the United States Government were stolen pursuant to that

conspiracy; that copies of such stolen documents are secreted in the files of the Church of Scientology in Los Angeles, California, and Washington, D.C.; that subsequent to the confrontation between Messrs. Meisner and Wolfe and agents of the F.B.I. on June 11, 1976, officials of the Church of Scientology conspired to obstruct justice by preparing a false response to expected inquiries of Meisner and Wolfe by law enforcement authorities and federal grand juries; that plans, scenarios and directives were committed to writing in furtherance of this conspiracy; that such writings are secreted in the files of the Church of Scientology in Los Angeles, California, and Washington, D.C.; that the objects of this latter conspiracy were met in part before a Grand Jury of the United States District Court for the District of Columbia on June 10, 1977; that, thereafter a summary of Wolfe's Grand Jury testimony was prepared by him in furtherance of the objectives of this latter conspiracy; and that copies of that summary are secreted in the offices of the Church of Scientology in Los Angeles, California, and Washington, D.C.

WHEREFORE, affiant requests the issuance of Search Warrants for the premises described above authorizing searches for the items described above, which items are either fruits, instrumentalities or evidence of the crimes of conspiracy, obstruction of justice, and theft of Government property set forth in this affidavit.

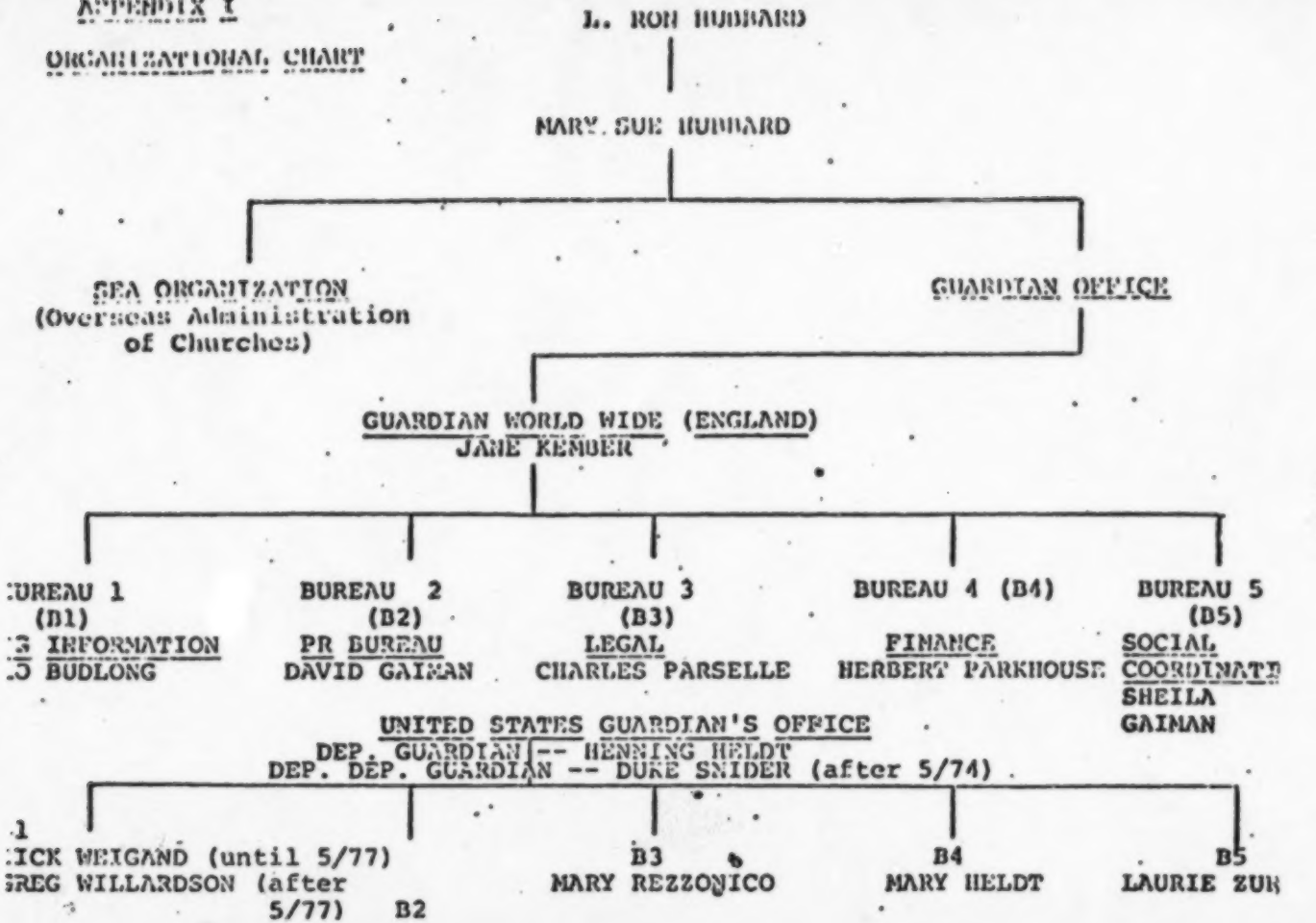
/s/ Robert Tittle
Special Agent, Federal Bureau
of Investigation

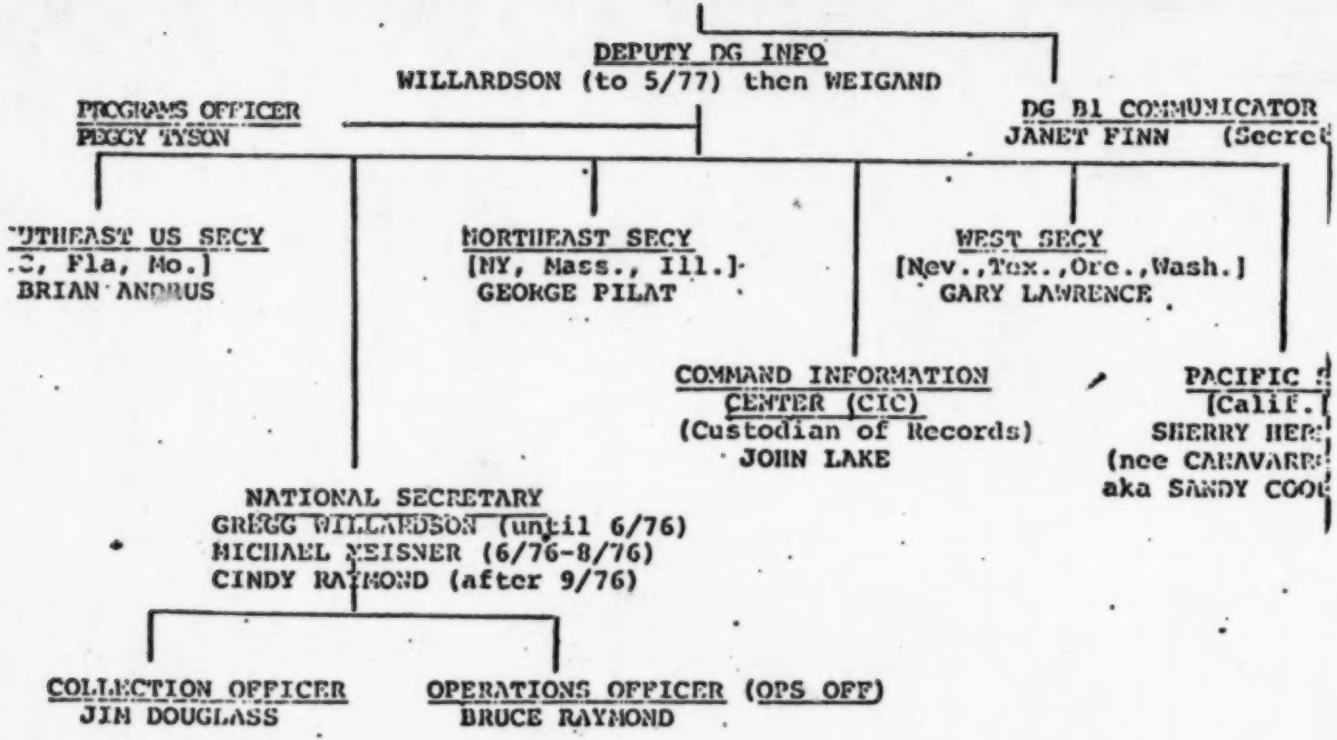
Sworn to and subscribed before me this 4th day of July, 1977.

/s/ Henry H. Kennedy
United States Magistrate for
the District of Columbia

APPENDIX I

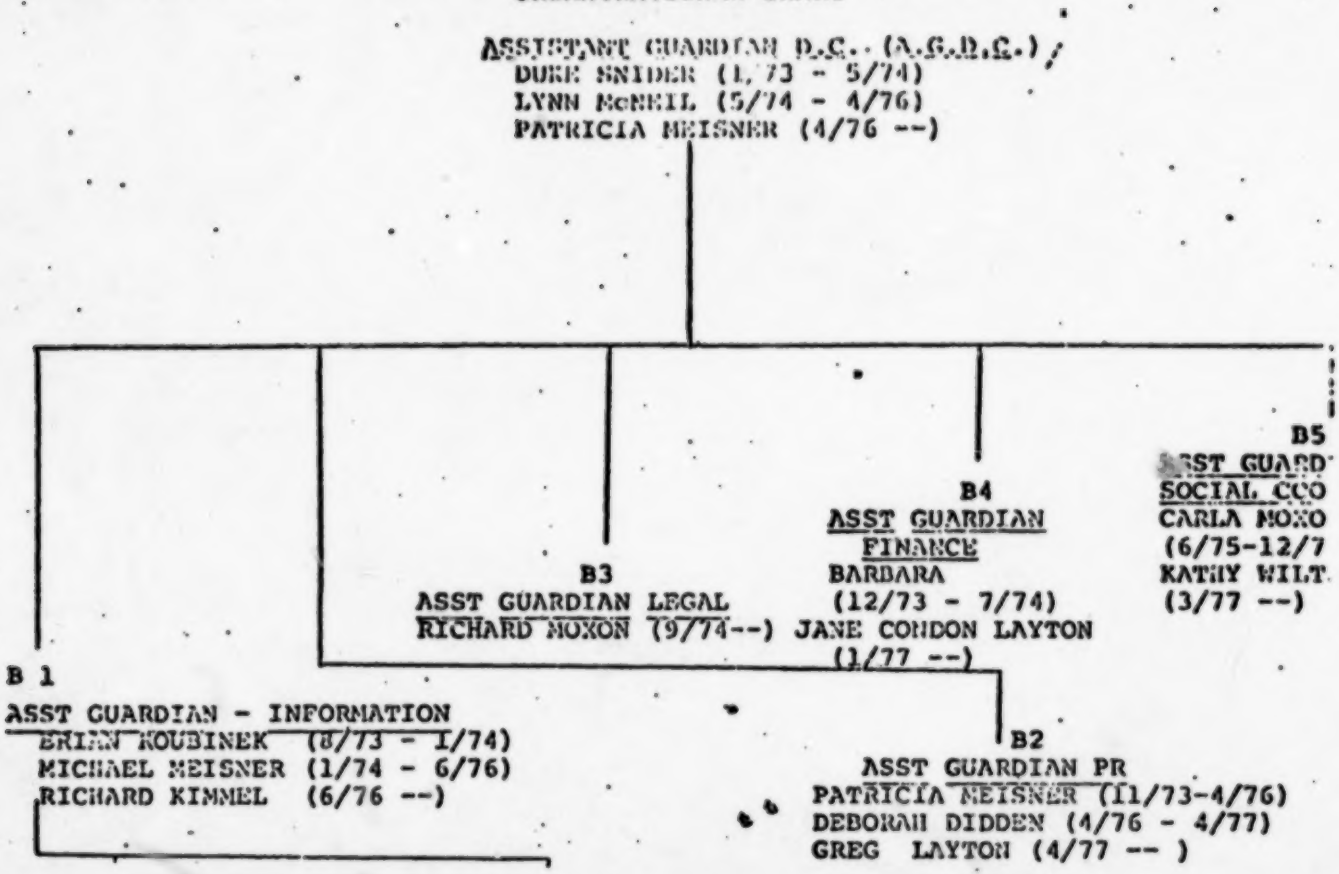
ORGANIZATIONAL CHART

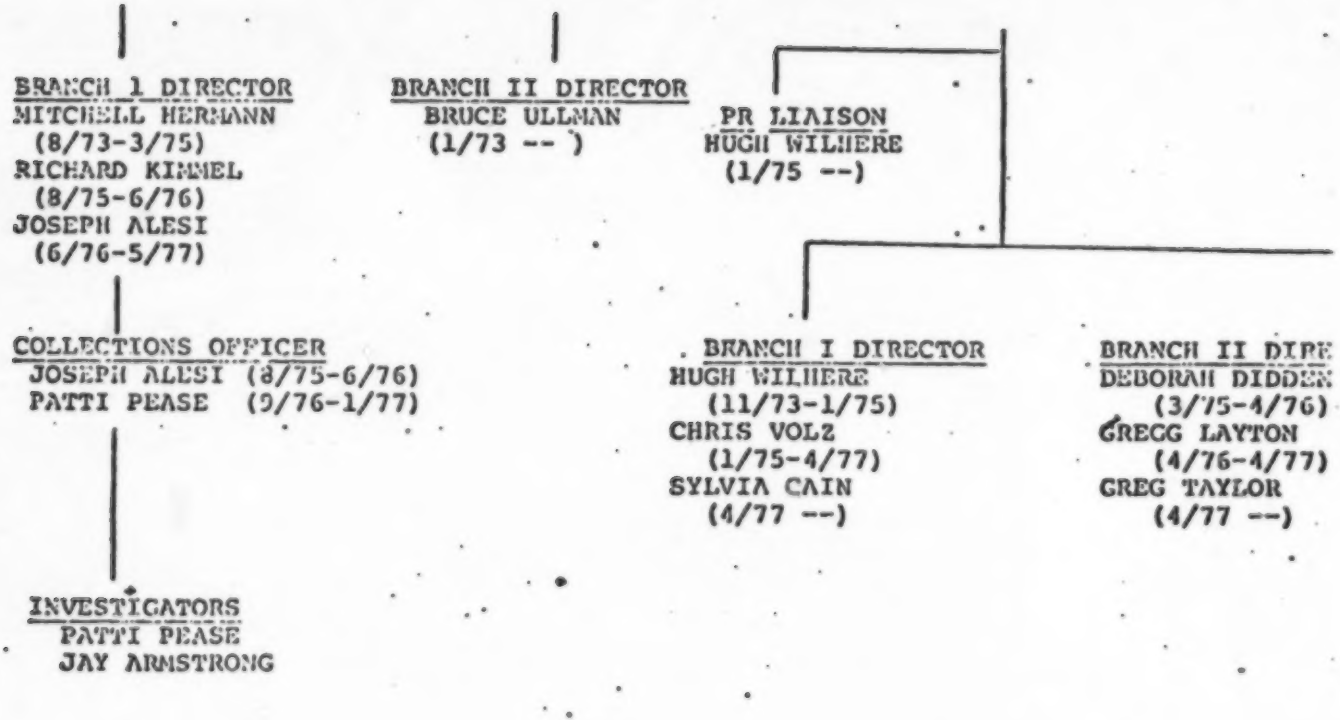



DEPUTY DG INFO
WILLARDSON (to 5/77) then WEIGAND
PROGRAMS OFFICER
PEGGY TYSON
DG B1 COMMUNICATOR
JANET FINN (Secre
UTHEAST US SECY
.C, Fla, Mo.]
BRIAN ANDRUS
NORTHEAST SECY
[NY, Mass., Ill.]
GEORGE PILAT
WEST SECY
[Nev.,Tex.,Ore.,Wash.]
GARY LAWRENCE
COMMAND INFORMATION
CENTER (CIC)
(Custodian of Records)
JOHN LAKE
PACIFIC
[Calif.
SHERRY HER
(nee CANAVARR
aka SANDY COO
NATIONAL SECRETARY
GREGG WILLARDSON (until 6/76)
MICHAEL WEISNER (6/76-8/76)
CINDY RAYMOND (after 9/76)
COLLECTION OFFICER
JIM DOUGLASS
OPERATIONS OFFICER (OPS OFF)
BRUCE RAYMOND

APPENDIX II

DISTRICT OF COLUMBIA GUARDIAN'S OFFICE
ORGANIZATIONAL CHART




BRANCH 1 DIRECTOR
MITCHELL HERMANN
(8/73-3/75)
RICHARD KIMMEL
(8/75-6/76)
JOSEPH ALESI
(6/76-5/77)
BRANCH II DIRECTOR
BRUCE ULLMAN
(1/73 --)
PR LIAISON
HUGH WILHERE
(1/75 --)
COLLECTIONS OFFICER
JOSEPH ALESI (8/75-6/76)
PATTI PEASE (9/76-1/77)
INVESTIGATORS
PATTI PEASE
JAY ARMSTRONG
BRANCH I DIRECTOR
HUGH WILHERE
(11/73-1/75)
CHRIS VOLZ
(1/75-4/77)
SYLVIA CAIN
(4/77 --)
BRANCH II DIRE
DEBORAH DIDDEN
(3/75-4/76)
GREGG LAYTON
(4/76-4/77)
GREG TAYLOR
(4/77 --)

Opposition

Supreme Court, U.S.
FILED
MAR 19 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1275

In the Supreme Court of the United States

OCTOBER TERM, 1981

FOUNDING CHURCH OF SCIENTOLOGY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General

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QUESTION PRESENTED

Whether documents seized pursuant to a warrant supported by probable cause must be returned to petitioner because one clause in the warrant was too general or because of the manner in which the search was executed.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 3a-64a) is reported at 667 F. 2d 117. The memorandum and order of the district court (Pet. App. 68a-79a) are not reported. A prior opinion of the court of appeals (Pet. App. 82a-96a) is reported at 572 F. 2d 321, and a prior memorandum and order of the district court (Pet. App. 103a-121a) are reported at 436 F. Supp. 689.

JURISDICTION

The judgment of the court of appeals was entered on October 2, 1981. A petition for rehearing was denied on November 10, 1981 (Pet. App. 65a-67a). The petition for a writ of certiorari was filed on December 31, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case, like No. 81-1227, arises from efforts by members of the Church of Scientology to obtain United States government documents by breaking into government offices and by other illegal means, and to hinder the investigation of their illegal activities. We describe some of these actions in our Brief in Opposition in a related case (81-1227 Br. Op. 3-5).[1] After Michael Meisner, a Scientology member central to these operations, surrendered himself and began cooperating with the government, the government obtained three search warrants to search Scientology offices for evidence of these activities, including stolen government documents. These warrants were essentially identical, and were based on essentially identical affidavits recounting Meisner's revelations and the government's independent confirmation of them. See 81-1227 Br. Opp. 3-5, 7 & n.5.

Two warrants authorized searches of Scientology offices in California. Some of the evidence found during those searches was used to convict the petitioners in No. 81-1227 and other Scientology members. The other warrant was used to search a Scientology office in Washington, D.C. The fruits of this search were not used in the criminal prosecution. Petitioner in the present case, the Church of Scientology, filed a motion under Fed. R. Crim. P. 41(e) seeking the return of all the documents obtained in the Washington, D.C. search.

The United States District Court for the District of Columbia initially upheld petitioner's claim, ordering the documents returned on the ground that Item 162 of the warrant was too general (Pet. App. 103a-121a). Item 162 authorized a search for the following (Pet. App. 104a):

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[1] A copy of our Brief in Opposition in No. 80-1227 has been served on petitioner.

> Any and all fruits, instrumentalities and evidence (at this time unknown) of the crimes of conspiracy, obstruction of justice and theft of government [property] in violation of 18 U.S.C. §§ 371, 1503 and 641 which facts recited in the accompanying affidavit make out.

The affidavit based on Meisner's information was appended.

The court of appeals overturned the district court's order, holding that under *Andresen* v. *Maryland*, 427 U.S. 463, 478-484 (1976), Item 162 was not impermissibly general (*In re Search Warrant Dated July 4, 1977*, 572 F. 2d 321 (D.C. Cir. 1977) (Pet. App. 82a-96a)). This Court denied certiorari, declining petitioner's invitation to rule that Item 162 was excessively general. *Founding Church of Scientology* v. *United States*, 435 U.S. 925 (1978). On remand, the district court held that "the United States illegally and unconstitutionally executed [the] warrant and converted the[] seizure of documents into a general exploratory seizure" (Pet. App. 78a). It again ordered all the documents returned (*ibid.*).[2]

The court of appeals again vacated the district court's order, unanimously finding that "the district court's holding that the search resulted in an unconstitutional general seizure is unsupported by the record and clearly erroneous" (Pet. App. 64a; see *id.* at 54a). The court noted that each of the agents conducting the search[3] carried a copy of the

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[2]The district court rejected other challenges to the search made by petitioner (Pet. App. 78a), holding that the factual allegations that formed the basis for the warrant were not stale and that the agents conducting the search did not use excessive force in violation of 18 U.S.C. 3109 (see Pet. App. 8a). The court of appeals affirmed the district court's ruling on these points (Pet. App. 55a, 64a). Petitioner does not renew these claims in this Court.

[3]Fifteen agents conducted the Washington, D.C. search; ten additional agents were present outside the building (Pet. App. 13a, 14a & n.8).

warrant and its description of the property to be seized; moreover, before the search, the agents were instructed about the areas and documents described in the search warrant and told to confine the search to those areas (*id.* at 14a). The agents then searched only the fourth floor suite specified in the warrant. Scientology members were present in the rooms and took notes and photographs; a Scientology member who observed the search testified that as the agents found documents they compared them with the warrant (*id.* at 14a-15a). The court of appeals also noted other testimony, from both agents and Scientology members, which showed that in each file the agents sought only those documents identified in the warrant (*id.* at 15a-16a). Superior officers, including an Assistant United States Attorney, were available on the scene and were consulted on several occasions (*id.* at 14a). During nine and one-half hours, the agents seized 567 documents, which just filled two cardboard boxes measuring 18 inches by 18 inches by 12 inches; some documents that were initially seized by an agent were ultimately rejected by a supervising agent, during the search, and returned to Scientology's files (*ibid.*).

The court of appeals considered, and rejected, the reasons the district court had given for its decision. The government had offered to return many of the documents to petitioner; the court of appeals disapproved the district court's "inordinately heavy reliance" on this fact (Pet. App. 58a; see *id.* at 16a-17a). The court of appeals also examined testimony relied on by the district court and concluded that "the methods and procedures used were not deliberately overbroad in scope, and were not designed to net documents outside the scope of the warrants. * * * The record and the testimony simply do not show a general rummaging by the agents amounting to an unconstitutionally general search which might require the return of all documents" (*id.* at 59a; see *id.* at 17a-23a).

The court of appeals therefore held that petitioner was not entitled to have all the documents returned to it. Although one member of the court of appeals panel found "no showing that the seizure of the documents the Government had decided to retain was illegal in any respect" (Pet. App.) and would simply have ordered the case dismissed (*id.* at 54a-55a), the panel majority permitted a remand for "a determination as to which particular documents, if any, were seized outside the warrant and must therefore be returned" (*id.* at 64a).

ARGUMENT

Petitioner does not contend that the warrant used to search its Washington, D.C. offices was not supported by probable cause.[4] On remand, petitioner will have an opportunity to show that particular documents that the government desires to retain were not lawfully seized. Thus petitioner's only claim at this point is that documents seized pursuant to a warrant supported by probable cause should be returned to it.

Petitioner's principal argument in support of this position (see Pet. 9-14) is that Item 162 was so broad that it rendered the warrant invalid. As we explain in our Brief in Opposition in No. 81-1227, the Court declined petitioner's invitation to consider this claim in 1978 (*Founding Church of Scientology* v. *United States, supra*), and the issue is no more worthy of review today. See 81-1227 Br. Opp. 13. Item 162 is, if anything, more specific than a comparable clause

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[4]Although petitioner suggests that the warrant was based on stale information (see Pet. 5), that issue is not comprised by the questions presented, and petitioner's claim on this point was rejected by both courts below. See page 3, note 2, *supra*.

that the Court did not disapprove in *Andresen* v. *Maryland, supra*.[5] Petitioner addresses only in passing (see Pet. 10) the principal issue discussed by both courts below—whether the manner in which the search was executed requires the return of all the documents. Petitioner suggests no reason for questioning the court of appeals' conclusions, based on an examination of the particular facts of this case, that the agents conducting the search were well disciplined, and that no aspect of the search justifies requiring the return of all the documents. See 81-1227 Br. Opp. 13-16.

Petitioner's contentions about the "severance doctrine" (Pet. 14-16) appear to depend entirely on its incorrect premise that Item 162 was excessively general. To the extent petitioner suggests that all evidence found in the search must be returned because some items not specified by the warrant were seized, its contention has no support in logic and is inconsistent with an unvarying series of court of appeals cases (see 81-1227 Br. Opp. 13-14).

Finally, petitioner contends that "the coupling of the plain view doctrine in connection with a[] * * * clause of the type allowed in * * * *Andresen* * * * results in a *per se* general search and seizure" (Pet. 16). Of course, the "plain view" exception to the warrant requirement does not affect the scope of a search, because it applies only if officers discover an object while engaged in a search of lawful scope (or while not engaged in a search at all). See *Coolidge* v. *New Hampshire*, 403 U.S. 443, 468 (1971) (plurality opinion). Thus a "perusal of all documents within the realm of

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[5]Petitioner suggests (Pet. 13) that there is a conflict in the lower courts on this issue. One case cited (*id.* at 13-14) by petitioner--*United States* v. *Jacob*, 502 F. Supp. 1221 (D. Md. 1980)—has been reversed. 657 F. 2d 49, (4th Cir. 1981). In the other case that petitioner suggests conflicts with the decision below, *Application of Lafayette Academy*, 610 F. 2d 1 (1st Cir. 1979), the affidavit that might have limited the search was—unlike the affidavit referred to in Item 162—neither served with the warrant nor incorporated by reference in the warrant (*id.* at 4).

the warrant," which apparently concerns petitioner (Pet. 17), is a necessary aspect of every search for documents, to the extent such a perusal is needed to determine if the document is specified in the warrant.

While the "plain view" doctrine can justify a seizure of articles that could not otherwise be seized, no issues pertaining to such a use of the doctrine are properly before the Court at this time. The court of appeals remanded to allow the district court to determine which of the documents the government seeks to retain were lawfully obtained. While the court of appeals discussed the "plain view" exception in order to aid the district court in this inquiry (Pet. App. 61a-64a), it is possible that the government will not have to rely on that doctrine, if all of the documents it seeks to retain were in fact specified by the warrant; in any event, at this point the Court has before it only the court of appeals' abstract discussion of the principles underlying the doctrine. The doctrine has not yet been applied to justify the seizure of any particular document.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

GLORIA C. PHARES
Attorney

MARCH 1982

DOJ-1982-03